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THE

Law

OF

LANDLORD AND TENANT,

WITH ALL THE REQUISITE

FORMS,

INCLUDING THE

P L E A D I N G S

IN THE SEVERAL ACTIONS BY AND AGAINST LANDLORD AND TENANT,

AND THE

EVIDENCE

NECESSARY TO SUPPORT THEM.

Second Edition.

BY

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TO THE
PRESENT EDITION.

A new Edition of this work being required, I have applied myself diligently to the preparing of it for publication. I have engrafted upon it all the cases which have been decided, all the statutes which have passed, relating to the many subjects of which the work treats, since the publication of the last edition. I have also altered all the pleadings in the different actions treated of, so as to make them conformable with the system of Pleading established by the recent Common Law Procedure Act and the New Rules of Pleading. I have taken considerable pains to make the whole correct, and I trust that the Reader will find it so.

J. F. A.

9, *King's Bench Walk, Temple.*

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P R E F A C E.

I HAVE been requested, by some of my friends at the Bar, to publish my Manuscript on the Law of Landlord and Tenant; and I most readily accede to the request. In doing so, however, I hope it will not be imagined that I under-value, in the slightest degree, the works already published upon the subject: I have no doubt that they well deserve the estimation in which they are holden by the Profession. But it has been suggested to me that a work somewhat more practical,—one which, besides treating of the tenancy, and of the different modes by which it may be created and determined, would show at a glance the several remedies which the law gives to the landlord against his tenant, to the tenant against his landlord, and to both against strangers,—one which would contain the pleadings in the different actions by and against landlord and tenant, and the evidence necessary to support them, in the same manner as in my recent work upon the law of Nisi Prius,—would be acceptable to the Profession; and as my Manuscript was written in that form, I have consented most readily to publish it.

The subject of this little work originally formed part of a work of much greater extent, which, very early in my professional life, I had projected, treating of the remedy by action for all injuries, and comprising the law as to pleading and evidence generally; pleading and evidence in particular actions, real, personal and mixed; pleading and evidence in actions by and against particular persons; and also comprising the practice in civil actions in the different courts of common law at Westminster. I planned the work, collected my materials, and arranged them in a plain and lucid order; but after I had made some considerable progress in my Manuscript, I soon perceived the extraordinary magnitude of the work I had undertaken, and I was convinced that I should render it more extensively useful, if I should divide it according to the different subjects of which it treated, and publish each part separately. I first published the Practice in personal Actions and Ejectment. I afterwards published that part of my Manuscript relating to Pleading and Evidence generally, together with the pleadings and proceedings in real actions, (which my familiar acquaintance with the year books and old reports enabled me very much to simplify); and the pleadings and proceedings in mixed actions, namely, the writ of Waste, Quare impedit, and Ejectment. I have recently re-modelled and rewritten the title Ejectment, giving the evidence applicable to every title; and have published it,

together with the pleadings and evidence, &c., in the several personal actions, in a little work which I have named the Law of Nisi Prius. Two portions of the Manuscript still remained unpublished, namely, that relating to the Law of Landlord and Tenant, and the greater part of that relating to Mercantile Law: the former I now publish; the latter, namely, the Mercantile Law, which I have long promised to the Profession, is now going to Press, and I shall use every exertion to complete it in as short a time as possible. I shall then have finished the task I had undertaken,—a task of no ordinary magnitude and difficulty,—one which I should long since have been deterred from prosecuting, were it not for the kind and flattering manner in which the Profession have received each portion of it as it appeared.

The manner in which this little work is arranged is very simple. It is divided into Six Parts: the first treats of the tenancy, and the manner in which it is created and determined; the second treats of the landlord's remedies against his tenant; the third, of the landlord's remedies against strangers; the fourth, of the tenant's remedies against his landlord; the fifth, of the tenant's remedies against strangers; and the sixth treats of fixtures.

The First Part comprises two chapters: one treating of the creation of the tenancy by lease in

writing, by parol demise, by agreement, by implied contract, by assignment, or by attornment; the other treating of the determination of the tenancy by effluxion of time, by surrender, by notice to quit, by notice to determine a lease for years, and by forfeiture.

The Second Part, treating of the landlord's remedies against his tenant, comprises four chapters: the first, as to his remedies for rent by distress, by action of debt or covenant, or by action for use and occupation, and by ejectment as for a forfeiture; the second, as to his remedy for other breaches of contract, express or implied, by action of covenant or assumpsit; the third, as to his remedy for waste, by action on the case, or by bill in equity; and the fourth, as to his remedy against his tenant for holding over after his tenancy has expired, namely, by action for double value or double rent, or by ejectment and action of trespass for mesne profits.

The Third Part, treating of the landlord's remedies against strangers, comprises four chapters: the first, as to his remedy for evicting or attempting to evict his tenant; the second, for injuries to his reversion; the third, as to his remedies against the sheriff, for not taking a replevin bond, for taking insufficient sureties in replevin, for not paying rent due to him in case of an execution against his tenant; and the fourth, as to his remedy against the sureties in replevin, upon the replevin bond.

The Fourth Part, treating of the tenant's remedies against his landlord, comprises seven chapters : the first, for breaches of contract, express or implied, by action of covenant or assumpsit ; the second, for a wrongful or irregular distress, by action of replevin, or action on the case, &c. ; the third, for the landlord's entry upon the demised premises without cause, by action of trespass ; the fourth, as to his remedy by the bill in equity, to be relieved against a forfeiture ; the fifth, as to his remedy for expulsion by a stranger, with or without title ; the sixth, for the landlord's allowing him to be distrained upon for rent due to a head-landlord ; and the seventh, as to the tenant's remedy for emblements.

The Fifth Part, treating of the tenant's remedies against strangers, comprises three chapters : the first, as to his remedy for trespass ; the second, as to disturbance of the tenant's right of common, either by the lord, or by a commoner, or by a stranger ; and the third, as to his rights and liabilities as an outgoing tenant.

The Sixth Part, as to fixtures, treats of landlord's fixtures, tenant's fixtures, trade fixtures, farm fixtures ; of the right of representatives to fixtures, that is to say, what fixtures go to the heir, what to the executor, what to a remainderman, what may be taken under an execution against the tenant,

what may be taken by his assignees under a fiat in bankruptcy against him ; and, lastly, it treats of actions in relation to fixtures, by the landlord or tenant, or by the assignee or mortgagee, &c., of either, or by a vendor against a vendee.

The Reader will find, therefore, that this work, small as it is, treats of the whole of that part of the Law of England which relates to Landlord and Tenant, and to the several proceedings arising from the relation between them. This, and the practical form I have given the work, will, I hope, procure for it a favourable reception. I have given the pleadings in the different actions treated of, and after each pleading the evidence necessary to support it, in the manner adopted by me in my recent work on the Law of Nisi Prius, which I understand has given great satisfaction to the Profession. If, indeed, this work be received by the Profession as favourably as they have received the work to which I have now alluded, I shall have great reason to be satisfied : I cannot anticipate or desire for it a higher distinction.

J. F. A.

King's Bench Walk, Temple.

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		69, 72, 194				Collins v. Barrow, 1 <i>Moody & R.</i>				112.	166			Collins v. Harding, 13 <i>Co.</i> 57.....	176			Colyer v. Speer, 2 <i>Brod. & B.</i> 67.				250, 252, 255				Concannen v. Lethbridge, 2 <i>H. Bl.</i>				36	247			Cooke v. Loxley, 5 <i>T. R.</i> 4	164			Coombs v. Beaumont, 5 <i>B. & Ad.</i> 72.	361			Cooper, — v., 2 <i>Wils.</i> 375	114			Cooper v. Blandy, 4 <i>Moore & S.</i>				562.....	223			Cooper v. Marshall, 1 <i>Burr.</i> 259	342			Cooper v. Sherbrooke, 2 <i>Wils.</i> 116.	287			Copeland v. Watts, 1 <i>Stark.</i> 96	88			Core's Case, <i>Cro. El.</i> 544	278			Cornish v. Cawsey, <i>Ro. Abr.</i> 850 ..	25			Cornish et al. v. Searell, 8 <i>B. & C.</i>				476, 471.....	81, 84, 165, 224			Cosser v. Collinge, 3 <i>Mylne & K.</i>				283.....	62			Coster v. Wilson et al., 3 <i>Mees. & W.</i>				411. <i>Horn & H.</i> 141	146			Cotterill v. Hobby, 4 <i>B. & C.</i> 465 ..	239			Cowie v. Goodwin, 9 <i>Car. & P.</i> 378. 166				Cox v. Bent et al., 5 <i>Bing.</i> 185.....	61, 69			Cripps v. Blank, 9 <i>D. & Ry.</i> 480 ..	157			Crisp v. Churchill, 1 <i>B. & P.</i> 340,				<i>cit.</i>	168			Crisp v. Price, 5 <i>Taunt.</i> 548.....	31			Crocker v. Fothergill, 2 <i>B. & A.</i> 652. 234				Crosby v. Wadsworth, 6 <i>East</i> , 602..	60			Crosier v. Tomkinson, 2 <i>Ld. Ken.</i>				439	123, 303			Cross v. Jordan, 22 <i>Law J.</i> 70, <i>ex.</i> ...	170			Crosse v. Young, 2 <i>Show.</i> 425	278			Crowder v. Self, 2 <i>Moody & R.</i> 190. 294				Crowther v. Oldfield, 2 <i>Ld. Raym.</i>				1230	335			Cruace v. Bugby, 2. <i>W. Bl.</i> 760. 3				<i>Wils.</i> 234.....	107			Cully v. Spearman, 2 <i>H. Bl.</i> 396				117, 283				Curtis et al. v. Splitly, 1 <i>Bing. N. C.</i>				15	165			Curtis v. Wheeler, <i>Moody & M.</i> 493. 114				Cutting v. Derby, 2 <i>W. Bl.</i> 1075,				1077	212, 213																																
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		36	247			Cooke v. Loxley, 5 <i>T. R.</i> 4	164			Coombs v. Beaumont, 5 <i>B. & Ad.</i> 72.	361			Cooper, — v., 2 <i>Wils.</i> 375	114			Cooper v. Blandy, 4 <i>Moore & S.</i>				562.....	223			Cooper v. Marshall, 1 <i>Burr.</i> 259	342			Cooper v. Sherbrooke, 2 <i>Wils.</i> 116.	287			Copeland v. Watts, 1 <i>Stark.</i> 96	88			Core's Case, <i>Cro. El.</i> 544	278			Cornish v. Cawsey, <i>Ro. Abr.</i> 850 ..	25			Cornish et al. v. Searell, 8 <i>B. & C.</i>				476, 471.....	81, 84, 165, 224			Cosser v. Collinge, 3 <i>Mylne & K.</i>				283.....	62			Coster v. Wilson et al., 3 <i>Mees. & W.</i>				411. <i>Horn & H.</i> 141	146			Cotterill v. Hobby, 4 <i>B. & C.</i> 465 ..	239			Cowie v. Goodwin, 9 <i>Car. & P.</i> 378. 166				Cox v. Bent et al., 5 <i>Bing.</i> 185.....	61, 69			Cripps v. Blank, 9 <i>D. & Ry.</i> 480 ..	157			Crisp v. Churchill, 1 <i>B. & P.</i> 340,				<i>cit.</i>	168			Crisp v. Price, 5 <i>Taunt.</i> 548.....	31			Crocker v. Fothergill, 2 <i>B. & A.</i> 652. 234				Crosby v. Wadsworth, 6 <i>East</i> , 602..	60			Crosier v. Tomkinson, 2 <i>Ld. Ken.</i>				439	123, 303			Cross v. Jordan, 22 <i>Law J.</i> 70, <i>ex.</i> ...	170			Crosse v. Young, 2 <i>Show.</i> 425	278			Crowder v. Self, 2 <i>Moody & R.</i> 190. 294				Crowther v. Oldfield, 2 <i>Ld. Raym.</i>				1230	335			Cruace v. Bugby, 2. <i>W. Bl.</i> 760. 3				<i>Wils.</i> 234.....	107			Cully v. Spearman, 2 <i>H. Bl.</i> 396				117, 283				Curtis et al. v. Splitly, 1 <i>Bing. N. C.</i>				15	165			Curtis v. Wheeler, <i>Moody & M.</i> 493. 114				Cutting v. Derby, 2 <i>W. Bl.</i> 1075,				1077	212, 213																																																												
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		Cooper, — v., 2 <i>Wils.</i> 375	114			Cooper v. Blandy, 4 <i>Moore & S.</i>				562.....	223			Cooper v. Marshall, 1 <i>Burr.</i> 259	342			Cooper v. Sherbrooke, 2 <i>Wils.</i> 116.	287			Copeland v. Watts, 1 <i>Stark.</i> 96	88			Core's Case, <i>Cro. El.</i> 544	278			Cornish v. Cawsey, <i>Ro. Abr.</i> 850 ..	25			Cornish et al. v. Searell, 8 <i>B. & C.</i>				476, 471.....	81, 84, 165, 224			Cosser v. Collinge, 3 <i>Mylne & K.</i>				283.....	62			Coster v. Wilson et al., 3 <i>Mees. & W.</i>				411. <i>Horn & H.</i> 141	146			Cotterill v. Hobby, 4 <i>B. & C.</i> 465 ..	239			Cowie v. Goodwin, 9 <i>Car. & P.</i> 378. 166				Cox v. Bent et al., 5 <i>Bing.</i> 185.....	61, 69			Cripps v. Blank, 9 <i>D. & Ry.</i> 480 ..	157			Crisp v. Churchill, 1 <i>B. & P.</i> 340,				<i>cit.</i>	168			Crisp v. Price, 5 <i>Taunt.</i> 548.....	31			Crocker v. Fothergill, 2 <i>B. & A.</i> 652. 234				Crosby v. Wadsworth, 6 <i>East</i> , 602..	60			Crosier v. Tomkinson, 2 <i>Ld. Ken.</i>				439	123, 303			Cross v. Jordan, 22 <i>Law J.</i> 70, <i>ex.</i> ...	170			Crosse v. Young, 2 <i>Show.</i> 425	278			Crowder v. Self, 2 <i>Moody & R.</i> 190. 294				Crowther v. Oldfield, 2 <i>Ld. Raym.</i>				1230	335			Cruace v. Bugby, 2. <i>W. Bl.</i> 760. 3				<i>Wils.</i> 234.....	107			Cully v. Spearman, 2 <i>H. Bl.</i> 396				117, 283				Curtis et al. v. Splitly, 1 <i>Bing. N. C.</i>				15	165			Curtis v. Wheeler, <i>Moody & M.</i> 493. 114				Cutting v. Derby, 2 <i>W. Bl.</i> 1075,				1077	212, 213																																																																								
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		Copeland v. Watts, 1 <i>Stark.</i> 96	88			Core's Case, <i>Cro. El.</i> 544	278			Cornish v. Cawsey, <i>Ro. Abr.</i> 850 ..	25			Cornish et al. v. Searell, 8 <i>B. & C.</i>				476, 471.....	81, 84, 165, 224			Cosser v. Collinge, 3 <i>Mylne & K.</i>				283.....	62			Coster v. Wilson et al., 3 <i>Mees. & W.</i>				411. <i>Horn & H.</i> 141	146			Cotterill v. Hobby, 4 <i>B. & C.</i> 465 ..	239			Cowie v. Goodwin, 9 <i>Car. & P.</i> 378. 166				Cox v. Bent et al., 5 <i>Bing.</i> 185.....	61, 69			Cripps v. Blank, 9 <i>D. & Ry.</i> 480 ..	157			Crisp v. Churchill, 1 <i>B. & P.</i> 340,				<i>cit.</i>	168			Crisp v. Price, 5 <i>Taunt.</i> 548.....	31			Crocker v. Fothergill, 2 <i>B. & A.</i> 652. 234				Crosby v. Wadsworth, 6 <i>East</i> , 602..	60			Crosier v. Tomkinson, 2 <i>Ld. Ken.</i>				439	123, 303			Cross v. Jordan, 22 <i>Law J.</i> 70, <i>ex.</i> ...	170			Crosse v. Young, 2 <i>Show.</i> 425	278			Crowder v. Self, 2 <i>Moody & R.</i> 190. 294				Crowther v. Oldfield, 2 <i>Ld. Raym.</i>				1230	335			Cruace v. Bugby, 2. <i>W. Bl.</i> 760. 3				<i>Wils.</i> 234.....	107			Cully v. Spearman, 2 <i>H. Bl.</i> 396				117, 283				Curtis et al. v. Splitly, 1 <i>Bing. N. C.</i>				15	165			Curtis v. Wheeler, <i>Moody & M.</i> 493. 114				Cutting v. Derby, 2 <i>W. Bl.</i> 1075,				1077	212, 213																																																																																												
		Core's Case, <i>Cro. El.</i> 544	278			Cornish v. Cawsey, <i>Ro. Abr.</i> 850 ..	25			Cornish et al. v. Searell, 8 <i>B. & C.</i>				476, 471.....	81, 84, 165, 224			Cosser v. Collinge, 3 <i>Mylne & K.</i>				283.....	62			Coster v. Wilson et al., 3 <i>Mees. & W.</i>				411. <i>Horn & H.</i> 141	146			Cotterill v. Hobby, 4 <i>B. & C.</i> 465 ..	239			Cowie v. Goodwin, 9 <i>Car. & P.</i> 378. 166				Cox v. Bent et al., 5 <i>Bing.</i> 185.....	61, 69			Cripps v. Blank, 9 <i>D. & Ry.</i> 480 ..	157			Crisp v. Churchill, 1 <i>B. & P.</i> 340,				<i>cit.</i>	168			Crisp v. Price, 5 <i>Taunt.</i> 548.....	31			Crocker v. Fothergill, 2 <i>B. & A.</i> 652. 234				Crosby v. Wadsworth, 6 <i>East</i> , 602..	60			Crosier v. Tomkinson, 2 <i>Ld. Ken.</i>				439	123, 303			Cross v. Jordan, 22 <i>Law J.</i> 70, <i>ex.</i> ...	170			Crosse v. Young, 2 <i>Show.</i> 425	278			Crowder v. Self, 2 <i>Moody & R.</i> 190. 294				Crowther v. Oldfield, 2 <i>Ld. Raym.</i>				1230	335			Cruace v. Bugby, 2. <i>W. Bl.</i> 760. 3				<i>Wils.</i> 234.....	107			Cully v. Spearman, 2 <i>H. Bl.</i> 396				117, 283				Curtis et al. v. Splitly, 1 <i>Bing. N. C.</i>				15	165			Curtis v. Wheeler, <i>Moody & M.</i> 493. 114				Cutting v. Derby, 2 <i>W. Bl.</i> 1075,				1077	212, 213																																																																																																
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THE LAW OF LANDLORD AND TENANT.

I shall treat of the Law of Landlord and Tenant, under the following heads :

PART I. The Tenancy.

- II. The Landlord's remedies against his Tenant.
 - III. The Landlord's remedies against Strangers.
 - IV. The Tenant's remedies against his Landlord.
 - V. The Tenant's remedies against Strangers.
 - VI. Fixtures.
-

PART I.

THE TENANCY.

CHAPTER I. *The Tenancy, how created.*

- SECT. 1. *By Lease in writing.*
2. *By Demise by parol.*
3. *By Agreement.*
4. *By Implied Contract.*
5. *By Assignment.*
6. *By Attornment.*

CHAPTER II. *The Tenancy, how determined.*

- SECT. 1. *By Effluxion of time.*
2. *By Surrender.*
3. *By Notice to quit.*
4. *By Notice to determine a lease for years.*
5. *By Forfeiture.*

CHAPTER I.

The Tenancy, how created.

Under this head, I propose to treat of leases, of demises by parol, of agreements, of demises implied by law, of assignments, and of attornment.

SECTION I.

Lease.

A lease is a contract in writing, under seal, whereby a person, having a legal estate in hereditaments, corporeal or incorporeal, conveys a portion of his interest to another, in consideration of a certain annual rent or render, or other recompence; if he convey the whole of his interest, it is an assignment, not a lease, although by the deed he reserve rent to himself, and the deed contain covenants which were not in the original lease or conveyance to him (*a*). And the same, if by the deed he conveyed a greater interest than he himself possessed (*b*). It is otherwise, however, in the case of a transfer by parol of the whole of a man's interest reserving rent (*c*); for as that would be void by the statute of frauds, the courts, in order to give effect to it, hold it to be a demise, not an assignment (*d*).

As to the thing demised, a lease may be made not only of lands, but of all other hereditaments (*e*); such as advowsons, tithes, offices not concerning the administration of justice, and the like (*f*).

Formerly a lease of corporeal hereditaments might be by writing not under seal. But now, by stat. 8 & 9 Vict. c. 106, s. 3, it is enacted that "a lease, required by law to be in writing, of any tenements or hereditaments,—and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments,—and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing,—made after the first day of October one thousand eight hundred and forty-five, shall be void at law, unless made by deed." Also a lease of incorporeal hereditaments is, and always was, required to be by deed; otherwise it is void. Thus a lease of a several fishery in a public navigable river, in writing, but not under seal, was holden to be void (*g*). So, a lease of tithes (*h*), or of a right of way, or a right of passage for water (*i*), or of a right to shoot over a manor, or to fish in certain ponds (*k*), or the like, if not under seal, is invalid, and

(*a*) *Palmer v. Edwards*, 1 Doug. 187, n. *Pluck v. Digges*, 5 Bligh, N. S. 31.

(*b*) *Baker v. Gostling*, 4 Moore & S. 539.

(*c*) *Poulteney v. Holmes*, 1 Str. 405. *Preece v. Corrie*, 5 Bing. 24.

(*d*) *Palmer v. Edwards*, *supra*.

(*e*) Bac. Abr. Lease, A.

(*f*) 2 Cruise, s. 22—24.

(*g*) *Duke of Somerset v. Frogwell*, 5 B. & C. 875.

(*h*) *Gardiner v. Williamson*, 2 B. & Ad. 336.

(*i*) See *Hewlins v. Shippam*, 5 B. & C. 221.

(*k*) *Bird v. Higginson*, 2 Ad. & El. 606; 6 Ad. & El. 824.

confers no right upon the lessee, nor can the lessor distrain for any rent reserved by it. Even if there be a lease of a corporeal hereditament and also of an incorporeal hereditament in the one instrument, at an entire rent, it is void as to both, if it be not under seal (1); but if at distinct rents, it would formerly have been valid as to the corporeal hereditaments, though void as to the residue. At present, it would be bad as to both.

By whom.

All natural persons, who are capable of alienating their real property, or of entering into contracts respecting it,—and all lay corporations,—may make leases; and which will enure as long as their interest in the thing leased, but no longer (m). Leases also by persons having no estate in the demised premises, may bind them by estoppel; which we shall hereafter shortly notice. There are some restrictions on the exercise of this right, as well at common law as created by statute, and other provisions by statute enabling parties to make leases which previously they had no right to make, which I shall here consider, under the following heads:—

Infants.] An infant cannot make a lease of his lands, &c., unless it be evidently for his benefit (n). If not for his benefit, although not actually void on that account, it is voidable by him when he becomes of age, or by his heir if he die under age (o). If sued upon it, however, he cannot plead *non est factum*; but if he would avoid it, he must plead his infancy (p). On the other hand, when he comes of age, he may confirm a lease made by him during his infancy. And where a person took a lease of an infant's lands, and the infant, when he came of age, mortgaged the property to the lessee by a deed referring expressly to the lease, this was holden to be a confirmation of the lease (q). So where the infant, after he came of age, wished the lessee joy of his lease, this was holden to be a confirmation of it (r).

Married women.] A lease by a married woman, without her husband, unless made under a power for that purpose in a settlement, &c. is wholly void, both during the lifetime of her husband, and after his death; it does not even operate by way of estoppel.

But by stat. 32 Hen. 8, c. 28, s. 1, "all leases to be made of

(1) *Gardiner v. Williamson*,
supra; but see *R. v. Hochworth*,
7 Ad. & El. 492.

(m) 4 Cruise, 63, s. 25.

(n) 4 Cruise, 74, s. 66, 67.

(o) 4 Cruise, s. 67.

(p) 5 Co. 119; Bac. Abr. Lease, B.

(q) *Story v. Johnson*, 3 Young
& C. 586.

(r) 4 Leon. 4, per Mead, J.

any manors, lands, tenements or hereditaments, by writing indented under seal, for term of years or for term of life, by any person or persons, being of full age of twenty-one years, having any estate of inheritance either in fee simple or in fee tail, in their own right, or in right of their churches or wives, or jointly with their wives, of any estate of inheritance, made before the coverture or after, shall be good and effectual in the law against the lessors, their wives, heirs and successors, and every of them, according to such estate as is comprised and specified in every such indenture of lease, in like manner and form as the same should have been, if the lessors thereof and every of them, at the time of the making of such leases, had been lawfully seised of the same lands, tenements and hereditaments comprised in such indenture, of a good, perfect, and pure estate of fee simple thereof to their only uses”(y).

Provided that this Act shall not extend “to any leases to be made of any manors, lands, tenements or hereditaments, being in the hands of any fermor or fermors by virtue of any old lease, unless the same old lease be expired, surrendered or ended within one year next after the making of the said new lease;—

— nor shall extend to any grant to be made of any reversion of any manors, lands, tenements or hereditaments;—

— nor to any lease of any manors, lands, tenements or hereditaments which have not most commonly been letten to ferm, or occupied by the fermors thereof, by the space of twenty years next before such lease thereof made;—

— nor to any lease to be made without impeachment of waste;—

— nor to any lease to be made above the number of twenty-one years or three lives at the most from the day of making thereof;—

— and that upon every such lease there be reserved, yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interests, so much yearly ferm or rent, or more, as hath been most accustomedly yielded and paid for the manors, lands, tenements and hereditaments so to be letten within twenty years next before such lease thereof made;—

— and that every such person and persons, to whom the reversion of such manors, lands, tenements or hereditaments so to be letten shall appertain as is aforesaid, after the deaths of such lessors or their heirs, shall and may have such like remedy and advantage, to all intents and purposes, against the lessees

thereof, their executors and assigns, as the same lessor should or might have had against the same lessees: so that if the lessor were seised of any special estate tail of the same hereditaments at the time of such lease, that the issue or heir of the special estate shall have the reversion, rents and services reserved upon such lease, after the death of the said lessor, as the lessor himself might or ought to have had if he had lived" (z).

"Provided always, that the wife be made party to every such lease, which hereafter shall be made by her husband of any manors, lands, tenements or hereditaments, being the inheritance of the wife;—

— and that every such lease be made by indenture in the name of the husband and his wife, and she to seal the same;—

— and that the ferm and rent be reserved to the husband and to the wife and to the heirs of the wife, according to her estate of inheritance in the same;—

— and that the husband shall not in anywise aliene, discharge, grant or give away the same rent reserved nor any part thereof, longer than during the coverture, without it be by fine levied by the said husband and wife; but that the same rent shall remain, descend, revert or come, after the death of such husband, unto such person or persons and their heirs, in such manner and sort, as the lands so leased should have done, if no such lease had been thereof made" (a). It seems that this section extends only to leases of lands which were the sole inheritance of the wife, and not to leases of lands of which she and her husband were joint tenants (b).

"Provided furthermore, that this clause or Act extend not to give any liberty to any such wife or to her heirs, for to avoid any lease hereafter to be made of any of the inheritance of the wife by her husband and her, for term of one-and-twenty years or under, or any her inheritance for term of three lives at the uttermost, whereupon as much yearly rent or more is or shall be reserved and yearly payable during the same lease, as was at any time therefore yielded and paid within twenty years next before making of any such lease, according to the tenor of this present Act" (c).

All leases of the wife's lands, not made in conformity with the provisions of this Act, are not binding on the wife after the death of her husband, or, if she die in the lifetime of her husband, are not binding upon her heirs (d). If it be made by the husband alone, or by the husband and wife by parol, no act of the wife after the husband's death will have the effect of confirming it (e). But if it be a lease in writing, by both husband and wife, but such as is not binding upon the wife,

(z) 32 Hen. 8, c. 28, s. 2.

(a) *Id.* s. 3.

(b) *Smith v. Trinder*, Cro. Car.

22. *Grute v. Locroft*, Cro. El. 297. 650.

(c) 32 Hen. 8, c. 28, s. 7.

(d) *Doc v. Weller*, 7 T. R. 478.

(e) *Walsall v. Heath*, Cro. El.

yet she may affirm it by the receipt of rent due after the death of her husband, if rent have been reserved (*x*), or, where rent is not reserved, by the acceptance of fealty, or by bringing an action of waste (*y*), or the like. And in like manner it may be confirmed by the heirs of the wife, where she dies in the lifetime of her husband (*z*).

Insane persons.] Persons of nonsane memory, being incapable of binding themselves by any contract, cannot of course make leases. But the Lord Chancellor may authorize the committee of the estate of such lunatic to make leases of his property, subject to such rents and covenants as he may direct (*a*). And he may authorize him to make building or repairing leases, or leases for farming purposes (*b*); or leases of mines, quarries, &c., which have been opened (*c*), or even of mines or quarries unopened, if it be necessary to do so for the maintenance of the lunatic (*d*). So, where a lunatic, having a limited estate in land, has a power of making leases, the Lord Chancellor may authorize the committee to execute the power (*e*). So, where a lunatic has made a lease for life or lives, or for a term of years, and it is for his benefit to renew it, or he is bound to do so, the Lord Chancellor may authorize the committee to accept a surrender of the old lease and grant a new one (*f*).

Leases by Corporations.] The corporations named in the schedules to the Corporation Act, 5 & 6 Will. 4, c. 76, shall not (except in pursuance of some contract entered into, or resolution entered in the corporation books, on or before the 5th June, 1835), demise or lease any of their lands, tenements, &c., for a term exceeding thirty-one years, or at a rent which shall not appear to the council to be reasonable, without fine,—unless they previously obtain the approbation of the lords of the treasury or three of them to their doing so (*g*). They may let land, however, for a term of seventy-five years, for building (*h*). And they may renew leases, if bound by covenant, deed, will, or ancient usage to do so (*i*).

Ecclesiastical persons, colleges, &c.] By stat. 32 H. 8, c. 28, s. 1 (already noticed, *ante*, pp. 3, 4), all leases of manors, lands, tenements or hereditaments, by writing indented under seal, for term of years or for term of life, by any person or persons being of full age of twenty-one years, having any estate of inheritance in right of their church, shall be good and effectual in the law against the lessors and their successors

(*x*) Bac. Abr. Lease, C.
 (*y*) *Jackson v. Mordant*, Cro.
 El. 112; Hut. 102.
 (*z*) 3 Bulst. 274; Ro. Rep. 403.
 (*a*) 43 G. 3, c. 73, s. 4.
 (*b*) 16 & 17 Vict. c. 70, s. 129.
 (*c*) Id. s. 130.

(*d*) 16 & 17 Vict. c. 70, s. 131.
 (*e*) Id. s. 133.
 (*f*) Id. s. 134.
 (*g*) 5 & 6 Will. 4, c. 76, s. 94.
 (*h*) Id. s. 96.
 (*i*) Id. s. 95.

Provided, by sect. 2, that this Act shall not extend to leases for more than twenty-one years or three lives, or to leases without impeachment of waste, or to concurrent leases unless the old lease expire or be surrendered within one year after the making of the new lease; and upon every such lease there shall be reserved the same yearly rent or more as was usually paid for the lands, &c., leased within twenty years next before (*k*). Provided also, that this Act shall not extend to enable any parson or vicar of any church or vicarage to make any lease or grant of any of their messuages, lands, tenements, tithes, profits or hereditaments belonging to their churches or vicarages, otherwise or in any other manner than they might have done before the making of this Act (*l*). But a prebendary is within this statute (*m*); so is the chancellor of a cathedral church (*n*); so are all ecclesiastical corporations sole, such as bishops, &c., but not corporations aggregate, such as deans and chapters, &c. (*o*).

As to bishops: By stat. 1 Eliz. c. 19, s. 5, all "gifts, grants, feoffments, fines, or other conveyances or estates," to be had, done, made or suffered by any archbishop or bishop, of any honours, castles, manors, lands, tenements or other hereditaments, being parcel of the possessions of his archbishoprick or bishoprick, or united, appertaining or belonging to the same, to any person or persons, body politic or corporate, whereby any estate should or may pass from such archbishops or bishops or any of them, other than for the term of twenty-one years or three lives from such time as any "such lease, grant, or assurance" shall begin, and whereupon the old accustomed yearly rent or more shall be reserved and payable during the said term of twenty-one years or three lives,—shall be utterly void and of no effect.

As to colleges, deans and chapters, parsons, &c.: By stat. 13 Eliz. c. 10, s. 3, reciting that long and unreasonable leases made by colleges, deans and chapters, parsons, vicars, and other having spiritual promotions, be the chiefest causes of the dilapidations and the decay of all spiritual livings, and the utter impoverishing of all successors incumbents in the same,—it is enacted that from thenceforth all leases, gifts, grants, feoffments, conveyances or estates, to be made, had, done or suffered by any master or fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital [or other house ordained for the sustentation or relief of the poor (*p*)], parson, vicar or any other

(*k*) See *ante*, p. 4.

(*l*) 32 Hen. 8, c. 28, s. 4.

(*m*) *Acton v. Pritcher*, 4 Leon.

51. *Watkinson v. Mann*, Cro. El. 350.

(*n*) *Bisco v. Holte*, Lev. 112; Sid. 158. *Ensden v. Dennis*, Palm. 105.

(*o*) 10 Co. 60 a.

(*p*) 14 Eliz. c. 14,

having any spiritual or ecclesiastical living,—of any houses, lands, tithes, tenements or other hereditaments [other than houses in any city, borough, town corporate or market town or the suburbs thereof, (not being the capital or dwelling-house used for the habitation of the persons aforesaid), and other than the grounds, not exceeding ten acres, to such house appertaining (*q*)], being any parcel of the possessions of such college, cathedral church, chapter, hospital, parsonage, vicarage or other spiritual promotion, or any ways appertaining or belonging to the same or any of them,—to any person or persons, bodies politic or corporate,—other than for the term of one-and-twenty years or three lives from the time such lease or grant shall be made or granted, whereupon the accustomed rent or more shall be reserved and payable yearly during the said term,—shall be utterly void and of no effect. Or if any former lease of such hereditaments, &c., be at the time in being, which is not to expire or be surrendered or ended within three years after the making of the new lease, such new lease shall be void and of no effect (*r*). Nor shall the Act be construed to make good any lease or grant by any such college or collegiate church in either of the universities of Oxford or Cambridge, or elsewhere within the realm of England, for more years than are limited by the private statutes of such college (*s*). As to parsons and vicars, we have seen that they are not enabled to make leases by stat. 32 H. 8, c. 28 (*t*); and by this stat. 13 Eliz. c. 10, they are not enabled to make any lease, but merely prohibited from making leases for more than twenty-one years or three lives; so that if they make a lease, within this statute, it must afterwards be confirmed by the patron and ordinary, as at common law, before it can be of any effect (*u*). But as to all other ecclesiastical sole corporations, they are enabled by stat. 32 H. 8, c. 28, to make leases, provided they conform to the provisions of that statute; and they are merely restrained by this statute from making the leases hereby prohibited. As to aggregate ecclesiastical corporations, such as deans and chapters, it was not necessary to enable them by statute to make leases, as they had authority to do so at common law; but they are restrained by this stat. 13 Eliz. c. 10, from making such leases as are prohibited by it.

Also, in all leases by any college, cathedral church, hall or house of learning in either of the universities of Cambridge or Oxford, or either of the colleges of Winchester or Eton, of any farm, or any their lands, tenements or hereditaments to which tithes, arable land, meadow or pasture do or shall apper-

(*q*) 14 Eliz. c. 11, s. 17.

(*r*) 18 Eliz. c. 11, s. 2.

(*s*) 18 Eliz. c. 10, s. 4.

(*t*) *Ante*, p. 7.

(*u*) *Bac. Abr. Lease*, F. G.

tain, one-third part at least of the old rent shall be reserved and paid in corn, that is to say, in good wheat after 6s. 8d. the quarter or under, and good malt at 5s. the quarter or under, to be delivered at the said colleges, &c., yearly upon days prefixed; and for default thereof, to pay in ready money, at the election of the lessees, after the rate of the best wheat and malt in the markets of Cambridge, Oxford, Winchester and Windsor respectively, on the next market day after the rent shall be due (x).

In what cases leases made contrary to these statutes, are nevertheless good as against the lessors during their incumbency, &c., see Bac. Abr. Lease, H. In what cases leases by parsons or vicars become void for nonresidence, see Id. F. But no such lease shall be impeached or avoided for simony in the lessor, to which the lessee is not privy (y).

By stat. 14 & 15 Vict. c. 104, provision is made to enable any ecclesiastical corporation, sole or aggregate, with the approbation of the church estates' commissioners, to sell to their lessees the whole of their reversion or interests in their lands under lease, and to enfranchise copyholds,—the money arising therefrom to be laid out in the manner therein directed. So, by the same Act, monies to be invested for the benefit of such corporations, may be laid out in the purchase of the interest of their lessees in leases before granted to them. And all lands thus acquired by such corporations, shall be let by them only from year to year, or for a term of years in possession not exceeding fourteen years,—except that, with the approval of the church estates' commissioners, they may grant mining or building leases of the same.

Tenants in tail.] At common law, a lease by tenant in tail was voidable by the issue in tail after the lessor's death. But we have seen (z), that by stat. 32 H. 8, c. 28, s. 1, a tenant in tail is enabled to make leases for twenty-one years or three lives, provided such leases be conformable with the provisions of that statute (a). If such a lease be in a form not authorized by that statute, the issue in tail may avoid it after the death of the lessor; or he may confirm it by acceptance of rent, &c. (b). But as the statute makes the leases thereby authorized good as against the lessors and their heirs only, and not as against remaindermen, &c., if therefore the tenant in tail die without issue, the remainderman or reversioner is not bound by the lease (c); it determines absolutely upon the

(x) 18 Eliz. c. 6, s. 1.

(y) 1 W. & M. c. 10, s. 2.

(z) *Ante*, pp. 3, 4.

(a) See sect. 2, *ante*, p. 4.

(b) Bac. Abr. Lease, D.; and see *Doc v. Jenkins et al.*, 5 Bing. 469.

(c) *Rees v. Phillips*, Wightw. 69.

death of the tenant in tail, so that the remainderman cannot, by any act of his, confirm it (z).

Tenant for life.] A tenant for life can make a lease for his own life only (a); upon his death it absolutely determines, so that the remainderman cannot, by any act of his, confirm it (b). But in such a case, acceptance of rent, as rent, by the remainderman, will be evidence of a new tenancy from year to year, so as to render a notice to quit necessary (c). So if a man have an estate *pur auter vie*, and make a lease of it for a term of years, this is good only during the life of *cestui que vie*; upon his death, it becomes absolutely void, even although the lessor in the meantime have acquired the reversion (d). Tenants for life are frequently enabled to make long leases under powers, created for that purpose in settlements, &c., which we shall consider hereafter. Frequently also, where there is no such power, the remainderman or reversioner joins with the tenant for life in making the lease; and in that case, during the life, the instrument operates as the lease of the tenant for life and the confirmation of him in remainder, &c., and after the death of the tenant for life or *cestui que vie*, as the lease of the remainderman, &c. (e).

Tenant in dower or by the curtesy.] Tenants in dower or by the curtesy, being mere tenants for life, their leases absolutely determine with their lives; after which they cannot be confirmed by any act of the heir or reversioner (f).

Tenant for term of years.] A tenant for term of years may make an underlease of all or any part of the premises demised to him, provided his underlease be for a shorter term than his own; he must reserve to himself a reversion of some portion of his term, even if it be only a day, otherwise the instrument will be an assignment, and not an underlease (g). It is material to attend to this distinction; for by an underlease, no privity is created between the underlessee and the original lessor, and neither can maintain covenant against the other (h); whereas if the instrument amount in law to an assignment, the

(z) 8 Co. 34. Moor, 133. Co. Lit. 44. a. Cro. El. 702. Bro. Abr. Acceptance, 19. Bac. Abr. Lease, D.

(a) Bac. Abr. Lease, I. 2.

(b) *Doe v. Butcher*, 1 Doug. 50. *Jones v. Verney*, Willes, 169. *Jenkins v. Church*, Cowp. 482.

Doe v. Archer, 1 B. & P. 531, and see *Ludford v. Barber*, 1 T. R. 86.

(c) *Doe v. Watts*, 7 T. R. 83, and see *Doe v. Weller*, Id. 478.

Roe v. Ward, 1 H. Bl. 97.

(d) Co. Lit. 476. 6 Co. 15 a.

(e) Co. Lit. 45. a. *Treport's case*, 6 Co. 14.

(f) Bac. Abr. Lease, I. 1. Bro. Abr. Acceptance, 14, 19; Leases, 17, 19. Plowd. 30, 272. Cro. Car. 398. Vaugh. 80, 81.

(g) *Ante*, p. 2.

(h) *Halford v. Hatch*, 1 Doug. 183.

original lessor may sue the assignee, or the assignee sue the original lessor, on all covenants in the original lease which run with the land (i).

Copyholder.] The power a copyholder has of leasing his copyhold tenement, or part of it, is wholly regulated by the custom of the manor of which he holds : in nearly all manors, the copyholder is restricted to leases for a year, in others to leases for three years ; but they may lease for a longer term, if they have the lord's licence to do so. And making a lease for a term not warranted by the custom, amounts to a forfeiture of the copyhold tenement demised. But although a lease of a copyhold tenement be not warranted by the custom, and is therefore void as against the lord, yet it is good as between the parties (k), and as against strangers (l). When the lord's licence has been obtained, it dispenses with the custom, and the lease remains in force to the end of the term granted, provided the lord's estate continue so long. But if the lord's estate determine during the term, as if he be tenant for life and die, the lease is then at an end (m).

Joint tenants and tenants in common.] Joint tenants may join or sever in leases ; and such leases shall be binding, whether made to commence *in presenti* or *in futuro* (n). Tenants in common may, and often do, join in making leases ; but in that case the instrument does not operate as a joint demise of the whole, nor can it be pleaded as such (o) : but as to A.'s moiety, it is the lease of A., and the confirmation of B. ; and as to B.'s moiety, it is the lease of B., and the confirmation of A. (p). But tenants in common, of course, may sever in making leases of their respective moieties. As to parceners, the law is the same as in the case of tenants in common (q).

Executors and administrators.] If a man, possessed of a term for years, die, his executor or administrator may make a lease of it, in the same manner as the testator or intestate might have done. And an executor may do this, even before

(i) 5 H. 7, 19 a. 3 Co. 22 b. Cro. Jac. 309, 521, 522. 1 Saund. 240. *Walker v. Reeves*, 2 Doug. 461, n. 1 Arch. N. P. 387, 358. 32 H. 8, c. 34, s. 2. *Spencer's case*, 5 Co. 17 a. *Campbell v. Lewis*, 3 B. & A. 392. *Palmer v. Edwards*, 1 Doug. 186, n.

(k) Moor, 184. 1 Salk. 186, pl. 5.

(l) *Haddon v. Arrowsmith*, Cro. El. 461. Bac. Abr. Lease, I. 6.

(m) Gilb. 209. 1 Cruise, 301, s. 20.

(n) Co. Lit. 186. Bro. Abr. Grant, 154.

(o) See *Heatherley v. Weston et al.*, 2 Wils. 232. *Mantle v. Wollington*, Cro. Jac. 166. Per Eyres, Comb. 213. *Doe v. Errington*, 1 Ad. & El. 750.

(p) Ro. Abr. 877.

(q) *Milliner v. Robinson*, Moor, 682, pl. 930.

probate (*r*); but if he have refused probate, he cannot make a lease of the term after administration *cum testamento annexo* has been granted to another (*s*). Also if there be two or more executors, a lease by one will be as valid as if it were made by all, even although he reserve rent to himself only, and not to his co-executors (*t*).

Guardian.] A guardian in socage may make leases of the infant's land, for he has not merely a bare authority, but an interest in the land descended (*u*); but a testamentary guardian cannot (*v*); nor can a guardian for nurture (*w*).

Mortgagor or mortgagee.] A mortgagor in possession cannot make a lease of the mortgaged property, so as to bind his mortgagee (*x*), unless he have an authority express or implied from the mortgagee to do so (*y*); but such a lease will be good as between the parties. On the other hand, the mortgagee, although in possession, cannot make a lease, so as to bind the mortgagor, if he should afterwards redeem (*z*). In practice, when it is necessary to make a lease of mortgaged premises, both mortgagor and mortgagee join in the lease (*a*).

Judgment debtor and creditor.] If judgment be obtained against a debtor in any of the superior common-law courts at Westminster, the debtor cannot afterwards make a lease of his lands, freehold or copyhold, so as to bind the creditor, if he should afterwards sue out an *elegit*, and extend the lands under it (*b*). But such a lease would be good, as between the parties. On the other hand, a tenant by *elegit* cannot make a lease of the extended lands for a longer period than he himself is entitled to hold the lands under the writ and inquisition. If in such a case it be necessary to make any other lease of the property, the debtor should join in it.

Churchwardens and overseers of the poor.] By stat. 59 G. 3, c. 12, s. 17, lands purchased by churchwardens and overseers of the poor by authority of that Act, shall be conveyed

(*r*) *Roe v. Summers*, 2 W. Bl. 692. *Broker v. Charters*, Cro. El. 92; *Owen*, 44; *Moor*, 272.

(*s*) *Bac Abr. Lease*, I. 7.

(*t*) *Doe v. Sturges*, 7 Taunt, 217.

(*u*) *Lit. s.* 123, 124. *Co. Lit.* 88, 89. *Shopland v. Ridler*, Cro. Jac. 55, 98. *Brisden v. Hussey*, 2 Ro. Abr. 41.

(*v*) *Roe v. Hodgson*, 129, 135.

(*w*) *Piggot v. Garnish*, Cro. El. 678, 734.

(*x*) 2 Cruise, 98, s. 5. See *Keech*

v. Hall et al., 1 Doug. 21. *Thunder v. Belcher*, 3 East, 499.

(*y*) See *Doe v. Hales*, 7 Bing. 322. *Doe v. Cadwallader*, 2 B. & Ad. 473. *Evans v. Elliot et al.*, 9 Ad. & El. 342.

(*z*) *Hungerford v. Clay*, 9 Mod. 1. 2 Cruise, 104, s. 19, 20.

(*a*) See *Doe v. Adams*, 2 Cr. & J. 232.

(*b*) *Doe v. Hilder*, 2 B. & A. 782.

to them and their successors, in trust for the parish ; and they shall take and hold the same, in the nature of a body corporate (c). They may therefore make a lease of such lands, if it become necessary. Before this statute, however, a lease by parish officers, of lands belonging to the parish, created merely a tenancy from year to year (d).

Agent.] By stat. 29 C. 2, c. 3, s. 1, all leases of land [for a longer term than three years (e)], must, to be valid, be in writing, and signed by the parties making the same, or by "their agents thereunto lawfully authorized by writing." And now that a lease must be by deed (f), the authority to an agent to execute it, must be also under seal. If a power of attorney be given to an agent to execute leases, his execution of them in the name of his principal, will be the same in effect as if they were executed by the principal (g). They should be made and executed however in the name of the principal, and not merely in the name of the attorney (h). It is usually executed thus : "In witness whereof, A. B., of —, in pursuance of a letter of attorney bearing date the — [a true copy of which is] hereunto annexed, the hand and seal of the said C. D. to these presents hath subscribed and set, the day and year first above written," then writing the principal's name, and delivering the lease as the act and deed of the principal (i). But the form in which this is done, is not very material, provided it appear to have been executed for, and in the name of the principal, by the agent. And where a bond of submission was executed by one person for another, thus : "For James Brown, Matthias Wilks," and the seal was put opposite to the name of Wilks, the court held it to be sufficient (k).

In pursuance of a power.] A power of making leases for a longer term than the party would otherwise have authority by law to grant, is frequently given in settlements and devises, generally to those to whom an estate merely for life is thereby given, to enable them to let the lands beneficially as well for themselves as for those in remainder or reversion ; for if the lease must end with the life of the lessor, the land would probably be let, if at all, to great disadvantage. On the other hand, lest tenants for life should exert these powers to the prejudice

(c) See *Doe v. Hiley*, 10 B. & C. 863.

(d) *Doe v. Terry et al.*, 5 Nev. & M. 556 ; 1 Har. & W. 547.

(e) *Id.* s. 2.

(f) See *ante*, p. 2.

(g) See *Hamilton v. Earl of Clanricard*, 1 Bro. P. C. 341.

(h) *Frontin v. Small*, 2 Str. 706 ; 2 Ld. Raym. 1418. *White v. Cuyler*, 6 T. R. 177. Ro. Abr. 330. 9 Co. 76 b, 77. Cro. El. 115. Moor, pl. 191, 1100. Dy. 132.

(i) See Bac. Abr. Lease, I. 10.

(k) *Wilks et al. v. Back*, 2 East, 142.

of the persons in remainder or reversion, they are in general restrained by the words of the power from making leases except on certain conditions; by which means they are forced to secure the same advantages to those who may succeed to the estate, as to themselves (*t*). It has therefore been long settled, that the restrictive part of these powers shall be construed strictly against the tenants for life, and in favour of the remaindermen and reversioner; because the conditions upon which powers of this kind are given, are inserted with a view to their interest. And as the lessees under such leases, stand only in the place of the tenant for life, and derive their title merely under the power, if that be not strictly followed, the right of the remaindermen and the reversioner to possess the estate, freed from the lease, will take place of the right of the lessees, as superior to it (*u*). From whence it follows that every circumstance required by the power must be strictly followed, otherwise the lease will be void, and not even capable of being confirmed by the remaindermen (*x*), and the power will be deemed to be wholly unexecuted (*y*). Indeed, instruments by which leasing powers are executed, are construed more strictly than other deeds of appointment. Where, for instance, a general and indefinite power of leasing is given, without mention of the time when the term is to commence, it shall be deemed to authorize leases in possession only, and not leases in reversion (*z*).

The restrictions usually annexed to leasing powers relate

1. To the instrument by which the power is to be executed (*a*).
2. To the lands to be let (*b*).
3. To the time when the lease is to commence (*c*).
4. To its duration (*d*).
5. To the rent to be reserved (*e*).
6. To the clauses and covenants required to be inserted (*f*).

See also upon this subject generally, Bac. Abr. Lease, I. 11.

By stat. 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17, relief is given in certain cases, against defects in leases, made under a power.

To whom.

All persons whatsoever, even idiots, infants and married

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| (<i>t</i>) 4 Cruise, 174, s. 2. | (<i>b</i>) See 2 Cruise, 176, ss. 7—19. |
| (<i>u</i>) Fitzg. 219. <i>Doe v. Cavan</i> , | (<i>c</i>) See 2 Cruise, 183, ss. 20—42. |
| 5 T. R. 567. | (<i>d</i>) See 2 Cruise, 190, ss. 43—47. |
| (<i>x</i>) <i>Doe v. Watts</i> , 7 T. R. 83. | (<i>e</i>) See 2 Cruise, 192, ss. 48—60. |
| (<i>y</i>) 4 Cruise, 174, ss. 2, 3. | (<i>f</i>) See 2 Cruise, 198, ss. 61—68. |
| (<i>z</i>) <i>Suffolk v. Wroth</i> , Cro. El. 5. | <i>Doe v. Hole et al.</i> , 20 Law J. 57, qb. |
| 6 Co. 33 a. | <i>Doe v. Williams et al.</i> , 17 Law J. |
| (<i>a</i>) See 2 Cruise, 175, ss. 5, 6. | 154, qb. |

women, may be lessees. If they labour under any disability at the time of the making of the lease, they may, upon the removal of the disability, avoid such lease; but if they continue to occupy the thing demised, after the removal of the disability, the lease thereby becomes good and binding upon them (*h*).

See stat. 57 G. 3, c. 99, s. 2, which prevents clergymen from renting more than 80 acres of land, for the purpose of cultivation, without the consent in writing of their diocesan.

Form of a Lease under Stat. 8 & 9 Vict. c. 124.

In what form.] By stat. 8 & 9 Vict. c. 124, s. 1, reciting that it is expedient to facilitate the leasing of lands and tenements, it is enacted, that [from and after the 1st day of October, 1845 (*i*)], "whenever any party to any deed made according to the forms set forth in the first schedule to this Act, or to any other deed which shall be expressed to be made in pursuance of this Act, shall employ in such deed respectively any of the forms of words contained in column 1 of the second schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect and to be construed as if such party had inserted in such deed the form of words contained in column 2 of the same schedule, and distinguished by the same number as is annexed to the form of words employed by such party; but it shall not be necessary in any such deed to insert any such number" (*k*).

But "any deed or part of a deed which shall fail to take effect by virtue of this Act, shall nevertheless be as valid and effectual, and shall bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made" (*l*).

Parcels.] "Every such deed, unless any exception be specially made therein, shall be held and construed to include all outhouses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, waters, water-courses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever, to the lands and tenements therein comprised belonging or in anywise appertaining" (*m*).

(*h*) 2 Cruise, 79, s. 85. *Kettley*
v. Elliot, Cro. Jac. 320; Brownl.
120; 2 Bulst. 69.

(*i*) 8 & 9 Vict. c. 124, s. 7.

(*k*) 8 & 9 Vict. c. 124, s. 1.

(*l*) *Id.* s. 4.

(*m*) *Id.* s. 2.

Construction.] “ In the construction and for the purposes of this Act, and the schedules hereto annexed, unless there be something in the subject or context repugnant to such construction, the word ‘lands’ shall extend to all tenements and hereditaments of freehold tenure, and to such customary lands as will pass by deed, or deed and surrender, and not by surrender alone, or any undivided part or share therein respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing, and the converse; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and the word ‘party’ shall mean and include any body politic or corporate or collegiate, as well as an individual” (n).

Costs.] “ In taxing any bill for preparing and executing any deed under this Act, it shall be lawful for the taxing officer and he is hereby required, in estimating the proper sum to be charged for such transaction, to consider, not the length of such deed, but only the skill and labour employed, and responsibility incurred, in the preparation thereof” (o).

Schedules to which this Act refers.

First Schedule.

This indenture made the — day of — one thousand eight hundred and forty — [or other year], in pursuance of an Act to facilitate the granting of certain leases, between [here insert the names of the parties, and recitals, if any], witnesseth, that the said [lessor] or [lessors] doth or do demise unto the said [lessee] or [lessees], his [or their] executors, administrators, and assigns, all, &c. [parcels] from the — day of — for the term of — thence ensuing, yielding therefor during the said term the rent of [state the rent and mode of payment].

In witness whereof the said parties hereto have hereunto set their hands and seals.

(n) 8 & 9 Vict. c. 124, s. 5.

(o) 8 & 9 Vict. c. 124, s. 3.

Second Schedule.

COLUMN 1.

1. That the said [*lessee*] covenants with the said [*lessor*] to pay rent;

2. and to pay taxes;

3. and to repair;

4. and to paint outside every — year;

5. and to paint and paper inside every — year;

COLUMN 2.

1. And the said lessee doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessor, that he the said lessee, his executors, administrators, and assigns, will during the said term pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever.

2. And also will pay all taxes, rates, duties, and assessments whatsoever, whether parochial, parliamentary, or otherwise, now charged or hereafter to be charged upon the said demised premises, or upon the said lessor, on account thereof (excepting land tax, and excepting, in Ireland, tithe rent-charge and such portion of the poor-rate as the lessor is or may be liable to pay, and excepting also all taxes, rates, duties, and assessments whatsoever, or any portion thereof, which the lessee is or may be by law exempted from).

3. And also will during the said term well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney-pieces, windows, doors, fastenings, water closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks, and keys, and all other fixtures and things which at any time during the said term shall be erected and made, when, where, and so often as need shall be.

4. And also that the said lessee, his executors, administrators, and assigns, will in every — year in the said term paint all the outside wood-work and iron-work belonging to the said premises, with two coats of proper oil colours, in a workmanlike manner.

5. And also that the said [*lessee*], his executors, administrators, and assigns, will in every — year paint the inside wood, iron, and other works now or usually painted, with two coats of proper oil colours, in a workmanlike manner; and also re-paper with paper of a quality as at present, such parts of the premises as are now papered; and also wash, stop, whiten, or colour such parts of the said premises as are now plastered.

COLUMN 1.

6. and to insure from fire in the joint names of the said [*lessor*] and the said [*lessee*];

to show receipts;

and to rebuild in case of fire.

7. And that the said [*lessor*] may enter and view state of repair, and that the said [*lessee*] will repair according to notice.

8. That the said [*lessee*] will not use premises as a shop.

9. And will not assign without leave.

COLUMN 2.

6. And also that the said lessee, his executors, administrators, and assigns, will forthwith insure the said premises hereby demised, to the full value thereof, in some respectable insurance office, in the joint names of the said lessor, his executors, and administrators, and assigns, and the said lessee, his executors, administrators, or assigns, and keep the same so insured during the said term; and will, upon the request of the said lessor, or his agent, show the receipt for the last premium paid for such insurance for every current year; and as often as the said premises hereby demised shall be burnt down or damaged by fire, all and every the sums or sum of money which shall be recovered or received by the said [*lessee*], his executors, administrators, or assigns, for or in respect of such insurance, shall be laid out and expended by him in building or repairing the said demised premises, or such parts thereof as shall be burnt down or damaged by fire as aforesaid.

7. And it is hereby agreed, that it shall be lawful for the said lessor, and his agents, at all reasonable times during the said term, to enter the said demised premises to take a schedule of the fixtures and things made and erected thereupon, and to examine the condition of the said premises; and further, that all wants of reparation, which upon such views shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators, and assigns, will, within three calendar months next after every such notice, well and sufficiently repair and make good accordingly.

8. And also that the said lessee, his executors, administrators, and assigns, will not convert, use, or occupy the said premises or any part thereof into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose, or otherwise than as a private dwelling house, without the consent in writing of the said lessor.

9. And also that the said [*lessee*] shall not nor will during the said term assign, transfer, or set over, or otherwise by any act or deed procure the said premises or any of them to be assigned, transferred, or set over, unto any person or persons whomsoever, without the consent in writing of the said [*lessor*], his executors, administrators, or assigns, first had and obtained.

COLUMN 1.

10. And that he will leave premises in good repair.

11. Proviso for re-entry by the said lessor, on non-payment of rent or non-performance of covenants.

12. The said [lessor] covenants with the said [lessee] for quiet enjoyment.

COLUMN 2.

10. And further, that the said [lessee] will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections, and fixtures now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear, and damage by fire, only excepted.

11. Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or nonperformance of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators, and assigns, then and in either of such cases it shall be lawful for the said lessor, at any time thereafter, into and upon the said demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, re-possess, and enjoy as of his or their former estate, any thing hereinafter contained to the contrary notwithstanding.

12. And the lessor doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessee, his executors, administrators, and assigns, that he and they, paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said lessor, his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them.

Directions as to the Forms in the Second Schedule.

1. Parties who use any of the forms in the first column of this schedule, may substitute for the words "lessee" or "lessor" any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.
2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in the forms in the first column of this schedule, and cor-

- responding changes shall be taken to be made in the corresponding forms in the second column.
3. Such parties may fill up the blank spaces left in the forms 4 and 5 in the first column of this schedule so employed by them, with any words or figures, and the words or figures so introduced shall be taken to be inserted in the corresponding blank spaces left in the forms embodied.
 4. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.
 5. Where the premises demised shall be of freehold tenure the covenants 1 to 10 shall be taken to be made with, and the proviso 11 to apply to the heirs and assigns of the lessor; and where the premises demised shall be of leasehold tenure the covenants and proviso shall be taken to be made with and apply to the lessor, his executors, administrators, and assigns.

Form of a Lease at Common Law.

The demise.] The usual words of demise are,—“Demise, lease and to farm let.” But any other words, which are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for a determinate time, whether such words run in the form of a licence, covenant or agreement,—are of themselves sufficient, and will in construction of law amount to a lease for years, as effectually as if the most proper and pertinent words had been used for the purpose (*a*). Thus a licence to enjoy or inhabit a house, has been deemed a demise of it (*b*). So if A. by articles covenant with B. that he shall have, hold or enjoy certain lands for a certain time, this amounts to a lease: but if A. covenants with B. that C. shall have, hold or enjoy them, it is otherwise (*c*). So, where the owner of the fee agreed to convey the premises to B. for a certain number of years at a certain rent, and the instrument contained the usual

(*a*) Bac. Abr. Lease, K.

(*b*) Bac. Abr. Lease, K. 5 H. 7, 1.
1 Leon. 129. 3 Bulst. 252. Sid.
458. 2 Lev. 194. *Right v. Proc-*
tor, 4 Burr. 2208.

(*c*) Bac. Abr. Lease, K. *Drake*
v. Monday, Cro. Car. 207. *Tisdale*
v. Essex, Hob. 34. *Doe v. Ash-*
burner, 5 T. R. 163.

covenants for payment of rent, &c., this was holden to be a lease (d). So where A. agreed to let, &c., it was holden to be a present demise (e). So where B. agreed "to pay A. the sum of 140*l.* per annum in quarterly payments, for the house and premises at &c., for the term of seven, fourteen or twenty-one years, at his option at the end of every seven years, the rent to commence on the 1st January 1827:" this was holden to amount to a lease (f).

And a stipulation in such an instrument that a lease shall be afterwards drawn up between the parties, does not of itself indicate an intention that the instrument should not operate as a present demise, but merely that a more formal instrument should thereafter be executed by them, to effectuate the same thing, as being more satisfactory than the present instrument. And therefore where by articles between A. and B., it was covenanted and agreed that A. "doth let" certain lands to B. for five years from Michaelmas then next, at a certain rent, and it was also covenanted that a lease should be made and sealed, according to the effect of these articles, before the feast of All Saints: this was holden to amount to an immediate lease, by reason of the words "doth let" in the present tense, and that the covenant for a future lease was only for further assurance; and the rather, in this case, as the time at which the future lease was to be executed, was after the commencement of the term (g). So where A. and B. entered into an agreement with C., whereby they agreed "with all convenient speed to grant to him a lease of, and they did thereby set and let to him," certain premises, for a certain term, at a certain rent, the lease to contain certain covenants, in one of which the words "this demise" occurred: the court held this to be a good lease *in presenti*, with an agreement to execute a more formal and perfect lease *in futuro*; the operative words of demise, set and let, being in the present tense, make it a demise, and the word "demise" in the stipulation as to the covenants, showed that the parties intended it to be so (h). So, where an instrument, by which A. agreed to let to B. certain premises, at a certain rent, from Christmas then next, for seven, fourteen or twenty-one years at the option of B., and B. agreed to paint and repair, &c., and to give six months' notice of his intention to determine the term at the end of seven or fourteen years,—contained also a stipulation that B.

(d) *Alderman v. Neate*, 4 Mees. & W. 704.

(e) *Staniforth v. Fox*, 7 Blug. 500; and see *Tarte v. Darby et al.*, 15 Law J. 320, ex.

(f) *Wright v. Trevezant*, Moody & M. 231; 3 Car. & P. 441.

(g) *Harrington v. Wise*, Cro.

El. 486. Moor, pl. 638. S. P. *Bury v. Nugent*, 5 T. R. 165, n.; 3 Doug. 179. *Doe v. Groves*, 15 East, 244. See *Goodtitle v. Way*, 1 T. R. 735.

(h) *Baxter v. Brown*, 2 W. Bl. 973.

was to be at the expense of preparing a lease for either of the terms above stated : this was holden to be a present lease, and not merely an agreement (*i*). So where by an instrument in writing A. agreed to let to B., and B. agreed to take, a certain piece of land, for a certain term, at a certain rent ; and in consideration of a lease to be granted for the said term, B. agreed to lay out 2,000*l.* within four years, in building certain houses upon it ; and A. agreed to grant a lease or leases as soon as the houses should be covered in, and B. agreed to take such leases, and to execute counterparts ; the agreement to be considered binding, till one fully prepared could be produced : the court held this to be a lease ; Lord Ellenborough, C. J., said that the rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the instrument, must govern the construction ; and here their intention appears to have been that the tenant, who was to expend so much capital upon the premises during the first four years of the term, should have a present legal interest in the term, which should be binding on both parties ; though when a certain progress should be made in the buildings, a more formal lease or leases, in which perhaps the premises might be more particularly described for the convenience of underletting or assigning, might be executed (*k*). So, where A. agreed to grant, seal and execute to B., “ a legal and effectual lease ” of certain premises for a certain term from a day then past, at a certain rent, and to contain certain covenants, and in the mean time until such lease should be executed, B. was to pay rent, and to hold the premises subject to the covenants above mentioned : this was holden to be an actual demise, and not merely an agreement ; no doubt the parties intended that a more formal contract should be executed ; but as the tenant was to hold in the mean time on certain terms here set out, this must be deemed a demise of the premises upon those terms (*l*). So, an instrument, by which A. agreed to let certain premises to B. “ on lease,” for a certain term at a certain rent, “ subject to the stipulations and covenants in the original lease under which he holds,” and “ to keep the said stipulations in every respect until the said lease should be granted, which lease, when required by B., was to be prepared by A.’s solicitor : Gaselee, J., held this to be a lease, and not merely an agreement for a lease (*m*). So where by a “ memorandum of agreement ” between A. and B., after reciting that A. and C. had abandoned the annexed contract for taking and letting

(*i*) *Warman v. Faithfull*, 5 B. & Ad. 1042. *Alderman v. Neate*, 4 Mees. & W. 704. *Chapman v. Black*, 4 Bing. N. C. 187.

(*k*) *Poole v. Bentley*, 12 East, 186.

(*l*) *Pinero v. Judson*, 6 Bing. 206.

(*m*) *Wilson v. Chisholm*, 4 Car. & P. 474.

certain lands (and which contract was in effect a lease), it was agreed that A. should let, and B. should take the same lands, upon the conditions contained in the annexed contract, "the said rent to be paid by quarterly payments, and to be in amount 220*l.*, and we further bind ourselves, each to the other, to execute a similar agreement to the one recited and referred to ;" this agreement was stamped as a lease, but the one annexed to it had no stamp : the court held that the stamped agreement incorporated the unstamped one, and that the two together might be given in evidence as a lease (*n*). So, where the instrument was thus: "Sept. 21, 1829 :—K. agrees to let and P. to take a house in its unfinished state, for the term of sixty years, at the rent of 525*l.*, payable quarterly, the first payment for the half quarter at Christmas next,—P. to insure the premises, and to have the benefit of an insurance lately paid,—a lease and counterpart to be prepared at the expense of P., and to contain all the clauses, covenants and agreements which K. entered into in the lease granted to him : " this was holden to be an actual demise, and not a mere agreement for a lease (*o*).

But the words used must be words of present demise ; no words merely indicating an intention of the parties at some time thereafter to demise, will constitute a lease. In the first place therefore, if the instrument contain an express stipulation that it shall not be deemed or taken to be a lease or actual demise, it is clear that it must be deemed an agreement merely, and not a lease (*p*). So, where a party agreed that in case he should become entitled to certain copyhold premises on the death of another, he would immediately demise them to J. S. : this was holden to be an agreement only, and not a lease (*q*). So, where the instrument contained a stipulation that out of the rent mentioned, a proportionate abatement should be made in respect of certain excepted premises, it was holden clearly to indicate that the parties intended only to execute an agreement ; for until the rent should be apportioned, the lessor could not distrain for it (*r*). So where it appeared upon the face of the instrument that the party agreeing to let certain premises, was to purchase other land to be added to it, for which the tenant was to pay a certain additional price : it was holden to be an agreement only (*s*). So where a party agreed to let certain premises, and it was stipulated that the lease should contain a covenant on the part of the tenant to purchase

(*n*) *Pearce v. Cheslyn*, 4 Ad. & El. 225.

(*o*) *Doe v. Ries*, 8 Bing. 178 S.P. *Hancock v. Caffyn*, 8 Bing. 458.

(*p*) *Perrin v. Brook*, 7 Car. & P. 360 ; 1 Moody & R. 510.

(*q*) *Doe v. Clare*, 7 T. R. 739.

(*r*) *Morgan v. Bissell*, 3 Taunt.

65.

(*s*) *Doe v. Ashburner*, 5 T. R. 163.

the fee for 600*l.* within the first seven years of the term to be granted : this was holden to be an agreement only, and not a lease (*t*). So, an agreement "to let, with a purchasing clause," the tenant to enter any time on or before the 11th February, 1820 : was holden to be an agreement, not a lease, as it did not appear from it when the tenancy was to commence, or when the rent was to become due, so as to enable the landlord to distrain for it (*u*); and the like, where the instrument did not state when the term was to commence, or when it was to determine (*v*). So, where by the instrument the rent was to be fixed by valuation, and the tenant was to find sureties for the payment of it, it was holden not to be a lease, but an agreement only (*w*). So, where a person proposed by letter to take a lease of a mine at a certain royalty and rent, the term to be about forty years from the 24th June then next, to which the other party by letter answered that he agreed to the terms, and should be happy to grant a lease conformable thereto: these letters were holden to constitute an agreement only, and not a lease (*x*). So where A., by an instrument in writing, agreed to grant, at the time thereafter mentioned, a lease of certain premises to B., for fifty-nine years from the 28th March then last past, at a certain rent payable quarterly, and B. agreed to accept and take the lease, and execute a counterpart, and in a subsequent part of the instrument it was stipulated that the lease thereby agreed to be granted, should be granted immediately after A. should obtain a lease of the same premises from C., to which he was entitled under a certain agreement : the court held that this could not be deemed a lease, as the parties knew that there was no power to grant one (*y*). So, where the instrument stated that the party was "contented to demise," &c., it was holden that the word "contented" imported merely approbation of something to be done thereafter, and that the instrument therefore was not to be deemed a lease, but an agreement only (*z*). So, where a party agreed to grant a lease for a certain term, at a certain rent, such lease to contain certain covenants and all other usual and reasonable covenants : it was holden to be an agreement and not a lease (*a*); for what were reasonable covenants, might be matter of dispute between the parties (*b*). So

(*t*) *Chapman v. Towner*, 6 Mees. & W. 100.

(*u*) *Dunk v. Hunter*, 5 B. & A. 322.

(*v*) *Clayton v. Burtenshaw*, 5 B. & C. 41; and see *Doe v. Morgan et al.*, 14 Law J. 5, cp.

(*w*) *John v. Jenkins*, 1 Cr. & M. 227.

(*x*) *Jones v. Reynolds*, 1 Gale & D. 62; and see *Doe v. Clark*, 14 Law J. 233, qb.

(*y*) *Hayward v. Haswell*, 6 Ad. & El. 265.

(*z*) *Pleazance v. Higham*, 2 Mod. 81.

(*a*) *Brashier v. Jackson*, 6 Mees. & W. 549.

(*b*) *Morgan v. Bissell*, 3 Taunt. 65. See *Goodtitle v. Way*, 1 T. R. 735. But see *Alderman v. Neate*, 4 Mees. & W. 704. *Baxter v. Brown*, 2 W. Bl. 973.

where, by a written instrument, A. agreed to grant B. a lease of certain premises for seven years, at a certain rent, the lease to contain certain covenants, but at the end of the instrument there was a memorandum that B. should have the option of having the lease made for fourteen years: this was holden to be an agreement, not a lease (c). So where A. agreed to grant B. a lease of certain premises, for a certain term from the 25th December then next, at a certain rent, the covenants to be the same as in a former lease of the same premises, and it was stipulated that until such lease should be granted, it should be lawful for A. to distrain for the rent: this was holden to be an agreement only; for if the parties intended that it should operate as a lease, the latter stipulation as to the power of distress would have been unnecessary (d). So where A. agreed that he would grant B. a lease of certain premises for fourteen years from the 25th December then last past, at 40*l.* a year, but that if B. should pay him 40*l.* before the end of the first quarter, then the rent should be reduced to 35*l.*: this was holden not to be a lease, but an agreement merely (e). So an agreement for a composition in lieu of tithes, cannot be deemed a lease, for nothing is thereby demised (f).

Commencement of the term.] The time at which the term is to commence must be stated; otherwise it cannot be known when the rent is to become due, or when the lessor may distrain for it. And it must be stated with certainty. Where a lease was made the 10th October, *habendum* from the 20th November, without saying in what year, or "next" or "last past:" the lease on this account was holden altogether void (g). But if a time be mentioned, which is impossible, as if the term be to commence on the 30th February or the 32nd April (h), or from the nativity of our Lord, not saying the feast of the nativity (i), in such a case the term commences from the delivery of the lease. But where a lease, dated the 25th March, 1783, was not in fact executed until some time afterwards, and the *habendum* was from the 25th day of March "now last past:" the court held that the term commenced on the 25th March, 1783, that being past at the time the lease was delivered (k). Formerly it was holden that where the *habendum* is "from and after the day of the date of these presents," the term commenced on the day of the date, the interest on the day after (l); but the court will

(c) *Rawson v. Eike*, 7 Ad. & El. 451.

(d) *Bicknell v. Hood*, 5 Mees. & W. 104.

(e) *Hegan v. Johnson*, 2 Taunt. 148.

(f) *Brewer v. Hill*, Anstr. 413.

(g) *Anon.*, 1 Mod. 180. Bac. Abr. Lease, L.

(h) Bac. Abr. Lease, L.

(i) Sid. 461. Vent. 84.

(k) *Steele v. Mart*, 4 B. & C. 272.

(l) *Cornish v. Cawsey*, Ro. Abr.

now construe these words "from the day of the date," to be either inclusive or exclusive of that day, according to the context and subject matter, and so as to effectuate the intention of the parties (*f*). In modern leases, if the holding is to be from a feast day, Michaelmas for instance, the court will hold it to mean New Michaelmas; and they will not allow either of the parties to show, by intrinsic evidence, that a holding from Old Michaelmas was meant or intended (*g*).

But it is not necessary that the day of the commencement of the term should be stated expressly; if a lease be made for so many years as J. S. shall name, then as soon as J. S. names the term, this ascertains as well the commencement as the continuance of it, and the instrument then becomes a valid lease (*h*). So, if A., seised of lands, grant to B. that as soon as he, B., shall pay twenty shillings, he thenceforth shall have and occupy the lands for twenty-one years,—as soon as B. pays the twenty shillings, this becomes a good lease for the twenty-one years from the date of the payment (*i*). So, if there be a lease for life, the lessor may grant to another person a lease for term of years, to commence upon the death of the tenant for life (*k*). So, a lessor may grant a lease for a term of years, to commence at the determination of a previous term for years which is still subsisting and unexpired (*l*): if made to commence from the end and expiration of the previous term, then, if the previous term be surrendered or forfeited, &c., the second term shall commence immediately; but if made to commence after the end and expiration of the twenty-one years aforesaid, then the second term would not commence until after the expiration of the twenty-one years (*m*). But the word "term" may, if necessary, be construed to mean either the time, or the interest, in the first demise (*n*). And where A. let Whiteacre to B. for ten years, and Blackacre to C. for twenty years, and then made a lease of both to D. for a term of years, *habendum* from the end or determination of the said several demises to B., and C.: it was holden that as to Whiteacre, the term granted to D. commenced immediately upon the expiration of the demise thereof to B., and was not to be deferred until the demise to C. had also expired (*o*). Where a lease is thus made to A.,

(*f*) *Pugh v. Duke of Leeds*, Brownl. 136. 3 T. R. 463, per Lord Cowp. 714.

(*g*) *Doe v. Lea*, 11 East, 312.

(*h*) Bac. Abr. Lease, L. 2. Co. Lit. 45 b. 2 Leon. 86. Plowd. 6, 373, 524.

(*i*) Co. Lit. 45 b. 6 Co. 35 a. Ro. Abr. 849.

(*k*) Bac. Abr. Lease, K. Dy. 124, pl. 40, 125, pl. 44. Plowd. 143, 150. Bro. Abr. Lease, 71. Yelv. 85.

Brownl. 136. 3 T. R. 463, per Lord Kenyon, C. J.

(*l*) Ro. Abr. 849. Dy. 261. 1 Leon. 199.

(*m*) Co. Lit. 45 b. Plowd. 198. Dy. 177, pl. 35.

(*n*) *Wright v. Cartwright*, 1 Burr. 282.

(*o*) 5 Co. 7. Moor, pl. 240. Cro. El. 199. 3 Leon. 105.

reciting a former one to B., and demising for a term of years to commence at the determination of B.'s lease,—if in fact no such lease had been made to B., then A.'s term will commence presently (*p*). And the same, if the first lease be void (*q*). But if there be such a former lease, and it be misrecited in a material part in the second, there the new lease can commence presently only in the enumeration of years, but not in interest until the expiration of the first lease (*r*). In the case of copyholds, if the lord make a grant or demise for years to A., after a grant for life to B., and B. die, and his wife become entitled to her freebench in the premises for life,—the demise to B. does not take effect until the death of the widow (*s*).

What has been here said, as to a term being made to commence at the determination of a previous demise, must be understood merely as referring to a lease for a term of years. A lease for life of corporeal hereditaments cannot be made to commence *in futuro*; if it be, it is void. But where a lease was made to a man, *habendum* to him and his heirs “from the day of the date thereof,” for the lives of three persons; and livery of seisin was not given for some time afterwards: the court held it to be sufficient, as until seisin was delivered, the freehold was in the lessor (*t*).

There is no objection, however, to the term for years commencing from a day which is past; and in that case the lease takes effect, in point of computation, from that day, but in point of interest, from the day of the date or delivery (*u*).

In the case of leases made under a power, if there be any restriction in the power as to the commencement of the terms to be thereby created, care must be taken to make the lease conformable with the power in that respect (*v*).

[*Continuance and end of the term.*] The continuance of the term, in a lease for years, must be ascertained with certainty, either by the express limitation of the parties themselves at the time the lease is made, or by reference to some collateral act, which may with equal certainty measure the continuance of it; otherwise it is void (*w*). If the term be uncertain, the lease will create a tenancy at will merely; as if it be to hold until a child, then in *ventre sa mere*, should be of full age,

(*p*) Bac. Abr. Lease, L. 1.

(*q*) Id.

(*r*) Id.

(*s*) *Chantrell v. Randal*, Lev. 20.

2 Sid. 165. *Irish v. Hook*, Bac.

Abr. Lease, L. 2.

(*t*) *Freeman v. West*, 2 Wills. 165. See *Pugh v. Duke of Leeds*, Cowp. 714, ante, p. 26.

(*u*) *Moore v. Hussey*, Hob. 18.

2 Ro. Abr. 850. And see *Enys v. Donnithorne*, 2 Burr. 1192.

(*v*) See 4 Cruise, 183, ss. 20—42.

(*w*) *Say v. Smith et al.*, Plowd. 271. Bac. Abr. Lease, L. 3.

this creates but a tenancy for will, for non constat that the child will ever arrive at that age (*x*). If it be granted for the life of one not in existence, it is void; but if it be granted for the lives of A. B. and C., and there be no such person as C., it is still good for the lives of A. and B. (*y*). If a lease be made for years, without saying how many, it is said that this shall be a lease for two years; for "years" must mean two at least, and beyond that it is bad for uncertainty (*z*).

Or the certainty of the term may appear from reference to some other collateral matter; as if a lease be made for so many years as J. S. shall name,—then, as soon as J. S. names the term, the lease is deemed certain in that respect, and valid (*a*). If A. let lands to B., for so many years as B. hath in the manor of D., and B. have then a term of ten years in that manor, this is a good lease for ten years (*b*). So if a man let lands during the minority of J. S., who is then ten years old, this is a good lease for eleven years; and if J. S. die before he attains the age of twenty-one, the lease determines at his death (*c*). If A. have a rent of twenty shillings per annum in fee issuing out of land, and he grant the rent to another until he shall have received out of the same rent 21*l.*, the grantee shall have it for twenty-one years (*d*); but if he grant lands of the value of twenty shillings a year, until 21*l.* be levied of the issues and profits, this, without livery, would be an estate at will only (*e*). But if a man grant another a lease of land for ten years, and if at the end of every ten years he should pay the lessor a certain parcel of tiles, he should have a perpetual demise of the land from ten years to ten years continually following: this is a good lease for ten years only, and bad as to the rest for uncertainty (*f*).

So, a lease for a certain term may be good, although it be stipulated that it shall determine at an earlier period, upon the happening of a certain event. And therefore if a lease be made to J. S. for twenty years, if the coverture between A. and B. shall so long continue: this is a good lease for twenty years, although the dissolution of the coverture may determine it sooner (*g*). But a lease to one generally during the coverture of A. and B., would create but a tenancy at will, by reason of the uncertainty how long the coverture will last (*h*). A lease for forty years, if J. S. shall so long live, is a lease for that number of years, determinable upon the death of J. S. And

(*x*) 6 Co. 35.

(*y*) *Doe v. Edwards*, 1 Mees. & W. 533.

(*z*) Bro. Abr. Lease, 13. 6 Co. 35, 36.

(*a*) 2 Leon. 86. Godb. 25. Co. Lit. 45 b. 6 Co. 35.

(*b*) Bac. Abr. Lease, L. 3.

(*c*) Bac. Abr. Lease, L. 3.

(*d*) 6 Co. 35 b. Co. Lit. 42 a. Plowd. 273.

(*e*) Id. Bro. Abr. Lease, 67. 3 Leon. 157. 3 Bulst. 100.

(*f*) Plowd. 271.

(*g*) Plowd. 273.

(*h*) Bac. Abr. Lease, L. 3.

a lease for years, if the lessee shall so long live, remainder to J. S. for the residue of the term, will be construed to give J. S. the residue of the term after the lessee's death (c). Where there is a lease for years to A. and B. if they should so long live, or to A. if he and B. should so long live, or if the lessor and lessee, or the lessor and J. S. should so long live: in any of these cases if one die, the lease is determined (d). But if a lease be made to two for years, with a proviso that if the lessees should die within the term, the term should cease: the death of one does not determine the lease, even as to his moiety (e). So a lease for years, if A., his wife *or* any of their issue should so long live, does not determine by the death of one of them (f); but otherwise, if the words had been "if A., his wife *and* issue, should so long live" (g). But where there was a lease for years, if the lessee should so long live and continue in the lessor's service, and the lessor died during the term: this was holden not to determine the tenancy, because the lessee was prevented from continuing in the service by the act of God (h). A term for years may also be determinable sooner, by a proviso in the lease that if the lessee fail to do certain acts, as for instance, to perform covenants, the lessor may re-enter; in this case the lessor, if he wish, may determine the lease by entry, upon the failure of the tenant to do the act stipulated.

A lease for life, is for the life either of the lessor or lessee, or of some third person. Where A. granted a lease of certain premises to B. "for and during the term of his natural life," and it was doubtful whose life was meant,—it was holden that although the name of B. was the last antecedent, and under ordinary circumstances the term would refer to it, yet that a covenant by A. for quiet enjoyment during the natural life of him the said A., showed that the intent was to grant the lease for the life of A., and the court decided accordingly (i). A lease for the life of a person not in existence, is void; but a lease for the lives of A. and B., if there be no such person as B., is good for the life of A. (k). If the lease be of corporeal hereditaments, it must be followed by livery of seisin, to give it any effect; the stat. 8 & 9 Vict. c. 106, s. 2, which dispenses with livery of seisin, extending only to conveyances of the immediate freehold, but seemingly not to leases. And until seisin is delivered, the freehold is in the lessor (l). But if the

(c) *Wright v. Cartwright*, 1 Burr. 282.

(d) 5 Co. 9. Cro. Jac. 78. 3 Bulst. 131. 3 Leon. 10. *Bailes v. Wenman*, Vent. 74.

(e) Dy. 67, pl. 18. Co. Lit. 219.

(f) *Moore*, pl. 375. 3 Bulst. 131, 133. 1 Ro. Rep. 310.

(g) 2 Brownl. 202. Cro. El. 209. 1 Leon. 74, 244. Co. Lit. 223 a.

(h) *Wrenford v. Giles*, Cro. El. 643; Noy, 70.

(i) *Doe v. Dodd*, 5 B. & Ad. 689.

(k) *Doe v. Edwards*, 1 Mees. & W. 533.

(l) *Freeman v. West*, 2 Wils. 105.

lease be of incorporeal hereditaments, the delivery of the deed has the same force as livery of seisin in the case of land (*m*).

A lease for a certain number of years from a certain day, for instance, the 25th March, is not determined until the last moment of the day of the 25th March in the last year of the tenancy (*n*). A lease for seven, fourteen or twenty-one years, as the lessee shall think proper, is in the first instance a lease for seven years; and if the lessee continue to hold after that, it is a lease for fourteen years; and if the lessee still continue, it is a lease for twenty-one years (*o*). Or more properly speaking, it is a lease for twenty-one years, determinable by the party at the end of seven or fourteen years, if he think fit (*p*). If the lease omit to mention at whose option it may be determined, the power of deciding whether it is to be for the short or the longer term is in the lessee alone (*q*). But if the option be given expressly to both parties, it may be determined by either, or by his representative entitled to the reversion or term respectively (*r*); and where the option was given to the parties, their executors and administrators, it was holden that the devisee of the lessor might determine the lease (*s*). But where the lease contained a proviso, that if either of the parties, their respective heirs or executors, should wish to put an end to the term at the end of seven or fourteen years, six months' notice in writing should be given under "his or their respective hands;" and the lessor died, leaving three executors: it was holden that a notice signed by two of them only, although given on behalf of themselves and the other executor, was not a good notice within the terms of the proviso, and did not determine the lease (*t*).

A lease for a year, and so on from year to year so long as both parties shall please, is a lease for two years certain (*u*); but where by agreement the "tenancy was to be from year to year from Michaelmas next," it was holden that the landlord might give a notice to quit at the end of the first half year (*v*). It is not determined by the death of the lessee (*w*) or lessor. A lease for three years, and then for other three years, and so from three years to three years during the life of the lessor, was holden by three judges to be a lease for twelve years, the other judge holding it to be a lease for nine years only (*x*).

(*m*) *Brewer v. Hill*, Anst. 419.

(*n*) *Ackland v. Lutley*, 9 Ad. & El. 879.

(*o*) *Ferguson v. Cornish*, 2 Burr. 1032; 3 T. R. 463, n.

(*p*) *Goodright v. Richardson*, 3 T. R. 462.

(*q*) *Dann v. Spurrier*, 3 B. & P. 399, 442. *Doe v. Dixon*, 9 East, 16.

(*r*) See *Goodright v. Mark*, 4 M. & S. 30.

(*s*) *Roe v. Hayley*, 12 East, 464.

(*t*) *Right v. Cuthell*, 5 East, 491.

(*u*) Bac. Abr. Lease, L. 3. Plowd. 273. Co. Lit. 45 b. 6 Co. 35. 2 Salk. 413; and see *Harris v. Evans*, 1 Wils. 262; Ambler, 329.

(*v*) *Doe v. Nainby*, 16 Law J. 303, qb.

(*w*) *Agard v. King*, Cro. El. 775. *Gostwick v. Mason*, Keilw. 63.

Mackay v. Mackreth, 4 Doug. 213.

(*x*) 1 Ro. Rep. 187. 2 Ro. Abr. 850. 3 Bulst. 158.

It is not necessary, however, that the continuance of the term should be stated in years: a lease for one hundred thousand days has been holden good (y); or a lease for a certain number of months would be good.

A lease of lands, also, may be made, to hold expressly at the will of the lessor. But a lease for ten years, at the will of the lessor, is a lease for ten years, and the words "at the will of the lessor" must be rejected as repugnant; and on the other hand, a lease at the will of the lessor, for one year and so from year to year, creates a tenancy at will only, the latter words being rejected as surplusage (z).

The parcels.] The lease should describe the premises demised, with certainty, in order to avoid dispute or litigation afterwards. A demise, however, of a farm, stating its name and where situate, will pass to the lessee all the land, buildings, &c., constituting the farm, at the time of the making of the lease; and the number and identity of the parcels, if at any time afterwards doubted or disputed, may be established by evidence. Where there was a demise of a messuage, with all the rooms and chambers, with the appurtenances belonging or in anywise appertaining thereto,—it was holden that this included only what was occupied together as an entire messuage at the time of the making of the lease, and that it did not comprehend a room, which had once formed a part of the messuage, but had been separated from it by a wooden partition, and had not been occupied with it for many years previously to the demise (a). Where a lease was made of certain houses, together with a piece of ground which formed part of an adjoining yard, together with all ways with the said premises or any part thereof theretofore used or enjoyed; and at the time of the making of the lease the whole of the yard was in the occupation of one person, who had always used and enjoyed a certain way by a gateway from the street to every part of the yard: it was holden that the lessee was entitled to the same right of way to that part of the yard let to him (b). But a covenant that the lessee should have the use of a "newly intended road, whenever the same may be made," was holden not to extend to a road which, when the parties agreed for the lease, was intended to be made, but was made and fully completed before the lease was executed (c). On the other hand, if a lease expressly refer to the parcels in a former lease, and purport to demise the same, the lessor will be bound by it, although part of the parcels had in fact been separated from

(y) 14 H. 8, 13. Bro. Abr. Lease, 13.

(z) Bro. Abr. Lease, 13, 22; Bac. Abr. Lease, 1, 3.

(a) *Kerslake v. White*, 2 Stark. 508.

(b) *Kooystra v. Lucas et al.*, 5 B. & A. 830; see *Harding v. Wilson*, 2 B. & C. 90.

(c) *Crisp v. Price*, 5 Taunt. 548.

the premises between the making of the one lease and of the other (c). If in the description of the parcels, the lease contain an exception, as for instance—of the trees growing upon the land demised,—this will warrant the landlord in going upon the premises, and dealing with what is so excepted, as if it were not included in the demise; and if the tenant bring an action of trespass against him for doing so, he may plead leave and licence (d).

As to the right of the landlord, at the end of the term, to any land acquired by his tenant by encroachment from the waste, and which he has enjoyed along with the land actually demised, see *Doe v. Jones*, 15 Mees. & W. 580; 16 Law J. 58, ex. *Andrews v. Hailes*, 22 Law J. 409, qb.

Reservation of rent.] Rent is a certain profit arising out of hereditaments corporeal, which are manurable, and upon which the lessor may distrain (e); so it may be reserved upon a demise of the vesture or herbage of land (g); and upon a grant of a future, as well as of a present, interest (h). But rent cannot be reserved upon a demise of incorporeal hereditaments, as of a common, advowson, office, &c. (i), or of a rent (j), or of tithes (k), or the like, except by the Queen (l); but if an annual payment be reserved upon such demises, although not in law a rent, yet an action of debt will lie for it, upon the contract (m), but the lessor cannot distrain for it, of common right, as for a rent (n)—nor at all, unless there be an express stipulation in the lease, enabling him to do so.

It must be a profit arising from the thing demised, and not any matter which is parcel of it; and therefore a reservation of the vesture or herbage of the land, as rent, would be bad (o). It is not necessary, however, that the rent should consist of money; for corn, horses, capons, hawks, spurs, and other matters may be rendered, and frequently are rendered, by way of rent (p). It may also consist in labour by the lessee, his servants, cattle, &c.—as for instance, to plough so many acres of land, or the like (q).

The rent reserved must be certain; the quantum or amount must either be expressly stated, and with certainty, or be such as by reference to something else can be certainly ascer-

(c) *Doe v. Osborne*, 4 Jurist, 941, cp.

(d) *Hewitt v. Isham*, 21 Law J. 35, ex.

(e) Co. Lit. 47 a, 142 a.

(g) Id.

(h) 2 Ro. Abr. 446.

(i) Co. Lit. 47 a, 142 a, 144 a. Cro. Jac. 679. 7 Co. 23. Noy, 60.

(j) Bro. Abr. Assise, 2.

(k) Co. Lit. 47 a. 2 Ro. Abr. 446. *Thornside v. Allinton*, Chan. Ca. 79.

(l) Co. Lit. 47 a (n. 1).

(m) Co. Lit. 47 a.

(n) Id.

(o) Co. Lit. 47 a.

(p) Co. Lit. 142 a.

(q) 2 Saund. 165.

tained (*y*). And therefore where a man demised at will, *reddendum* after the rate of 18*l.* per annum, as long as the demise should continue: in an action of debt for the rent, this reservation was holden bad for uncertainty; for it might be in corn, or any other thing of value; and as no time was limited for the payment of it, an action might be brought every day for it (*z*).

The rent is usually reserved yearly; but it may be reserved every two or three or more years, as the parties may choose to contract (*a*). It shall be presumed, however, to be reserved yearly, no matter how payable, unless it be expressly stated to the contrary. And if a lease be made for years, provided the lessee shall pay for it at Michaelmas and Lady-day 10*l.*, by even portions during the term, this will be construed a yearly rent (*b*). So, if a lease for years be made, rendering a certain rent at the four feasts, without saying yearly, yet this shall be construed to be a yearly rent, payable during the term (*c*). So if a rent be reserved, payable yearly, it shall be deemed to be payable yearly during the term (*d*). If the rent be reserved yearly, without saying when it is to be payable, it is payable at the end of every year, and the lessor cannot demand it half-yearly or quarterly (*e*). If it be made payable at the two usual feasts, these shall be deemed Michaelmas and Lady-day (*f*); and it must be paid by equal payments, although there be no stipulation to that effect in the lease (*g*). So if it be made payable at the four usual feasts, it shall be deemed to be payable quarterly, at Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day; and by equal payments, although nothing be mentioned in the lease to that effect. And in modern leases, these feasts shall be reckoned according to the new style (*h*), unless the intention of the parties to the contrary be satisfactorily proved (*i*). If it be payable at Michaelmas or other feast day, or within a certain number of days after, the lessee has until the last of these days to pay the rent; it is not in fact due, nor can it be demanded, before, so as to create a forfeiture by the non-payment of it (*k*). But at the end of the term, where the term ends on the feast day, the rent it seems is payable on the feast day, and the lessee has not the additional days within which to pay it (*l*). If the *reddendum* in the lease thus specify the days of payment, the time of payment must

(*y*) Co. Lit. 96 a. 2 Ld. Raym. 1100. See *Kendall v. Baker*, 21 Law J. 110, cp.

(*z*) *Parker v. Harris*, 1 Salk. 203; 2 Vent. 249, 270.

(*a*) Co. Lit. 47. a.

(*b*) 2 Ro. Abr. 449.

(*c*) Sld. 316.

(*d*) Moor, 459.

(*e*) Latch. 204; Lutw. 231.

(*f*) 2 Ro. Abr. 450; And. 122.

(*g*) 2 Ro. Abr. 450; Noy, 18.

(*h*) *Smith v. Walton*, 8 Bing. 235.

(*i*) *Doe v. Benson*, 4 B. & A. 588. *Denn v. Hopkinson*, 3 D. & R. 507, but see *Doe v. Lea*, 11 East, 312.

(*k*) *Clun's Case*, 10 Co. 127.

(*l*) *Barwick v. Foster*, Cro. Jac. 227, 233, 310. Yelv. 167; 1 Bulst. 1.

be computed by the *reddendum*, and not by the *habendum*; the *habendum* regulates the time of payment, only where the *reddendum* is general,—yielding and paying quarterly so much rent (*n*). And therefore where on the 8th September a house was let at an annual rent, payable quarterly, the first payment to be made on the 25th March next following: it was holden that a quarter's rent only became due on the 25th March (*n*). On the other hand, where a demise was made on the 21st March, 1828, *habendum* from the 25th March then instant, for the term of seven years wanting seven days, yielding and paying yearly and every year during the said term the yearly rent of 285*l.*, by four equal quarterly payments, on the 25th March, 24th June, 29th September, and 25th December in every year, commencing from the 25th March then instant: it was contended that the lessee was not compellable to pay the last quarter's rent, as it was made payable on a day after the end of the term; but the court held that either the first quarter's rent was payable on the 25th March, 1828, as a forehand rent, or that this was a contract to pay 285*l.* every year during the whole seven years, and in either case the lessor would be entitled to recover for the last quarter (*o*).

The rent must be reserved to the lessor, his heirs and assigns, or to the lessor, his executors, administrators and assigns; it cannot be reserved to a stranger (*p*). Even where in a demise by a tenant in fee, the rent was reserved to him and his son, it was holden bad, although it was his eldest son and heir-apparent (*q*). So, if he were to reserve rent to his "heir" it would be void altogether (*r*); or to "him or his heir," it would be void as to the heir (*s*); or to him and his wife, it would be void as to the wife (*t*); or to his heir by name, reciting that he was his heir-apparent, it would be void, although the lease was not to take effect until after the lessor's death (*u*). But if tenant in tail demise for years, reserving rent to him and his heirs, it shall be construed to mean the heir in tail (*v*). If a man seised as heir *ex parte maternâ*, demise, rendering rent to him and his heirs, it goes to the heir on the part of the mother (*w*). So, if a man, seised of land of the nature of Borough English, demise, rendering rent to him and his heirs, it goes to the youngest son (*x*). Even if

(*m*) *Tomkyns v. Pinsent*, 1 Salk. 141.

(*n*) *Hutchins v. Scott*, 2 Mees. & W. 809.

(*o*) *Hopkins v. Helmore*, 8 Ad. & El. 463.

(*p*) Lit. s. 346. Co. Lit. 47. a; 143. b.

(*q*) *Oates v. Frith*, Hob. 130.

(*r*) Co. Lit. 213. b.

(*s*) Id. 214. a.

(*t*) *Bland v. Inman*, Cro. Car. 288; 2 Ro. Abr. 447; W. Jon. 309.

(*u*) 2 Ro. Abr. 447.

(*v*) 1 Vent. 162.

(*w*) Hard. 90. Co. Lit. 12.

(*x*) Hard. 90.

tenant for life, with power to make leases, demise for years, reserving rent to him and his heirs, it shall go to the remainderman (*y*). Or if a tenant for one hundred years make a lease for fifty years, reserving rent "during the term," to him and his heirs, it shall go to his executors or administrators (*z*); or if tenant in fee demise for years, the lessee rendering rent "during the term" to him, his executors and assigns, it goes to the heir;—because it appears that it was to be paid during the term, and the law directs to whom (*a*); but otherwise, if the words "during the term" had been omitted (*b*). So, if tenant in fee make a lease, to commence at his death, reserving rent to his heir generally, this will be good (*c*). But if a man make a lease, reserving rent to himself only, or to him and his assigns, without mention of the heir or executor, &c., it shall not go to the heir or executor, &c. (*d*). If a demise be made to two joint tenants, reserving rent to one of them only,—if the demise be by parol or by deed-poll, it shall enure to both; but if it be by deed indented, he only to whom the rent is reserved will be entitled to it (*e*).

If the demised premises consist of two or more parcels, there is no objection to reserving a separate rent for each (*f*); for instance, if a lease be made of two manors, *habendum* one manor for 20s., and the other for 10s., these are several reservations, and each manor is charged with its respective rent (*g*). But if one entire rent be reserved in the first instance for the several parcels, however afterwards it may be distributed,—as if there be a demise of several houses, rendering the annual rent of 5*l.* at the usual feasts, viz. 3*l.* for one house, 10s. for another, and 1*l.* 10s. for the others, with a clause of re-entry upon the whole, upon non-payment of any part of the rent,—this in law is a reservation of one entire rent for all the parcels (*h*).

The reservation may be made in any form of words which express or imply that a return of something, which was not in the lessor before, is to be made in lieu of the thing demised (*i*). The usual words are "Yielding and paying for the same, yearly and every year during the said term, unto the said J. S. his heirs, [or executors, administrators] and assigns the clear yearly rent or sum of — pounds of the lawful current money of the United Kingdom, by equal quarterly payments on

(*y*) *Whitlock's Case*, 8 Co. 70 b.
 (z) *Per Hale, C. J.*, 1 Vent. 162.
 (*a*) Cro. El. 832. Cro. Car. 289.
Latch, 255, 264. *Sacheverell v. Frogate*, 2 Saund. 870; 1 Vent. 148, 161; 2 Raym. 213; 2 Lev. 13. *Mal-lory's Case*, 5 Co. 111.
 (*b*) 12 Co. 36. Cro. El. 217. Co. Lit. 47. a. 2 Ro. Abr. 450. 1 Vent. 161.

(*c*) 2 Ro. Abr. 447.
 (*d*) Co. Lit. 47. a. Com. Dig. Rent, B. 5. Bac. Abr. Lease, H. a.
 (*e*) 2 Ro. Abr. 447. Co. Lit. 47. a. Vent. 161.
 (*f*) Bac. Abr. Lease, E.
 (*g*) 4 Leon. 30.
 (*h*) Hob. 172. 3 Co. 54. Moor, 51, 199. 1 And. 175. 3 Leon. 124.
 (*i*) Co. Lit. 47. a.

the —," &c., "the first quarterly payment of the said yearly rent or sum to be made on the — day of — next ensuing the date of these presents." But it may be in any other words, implying the same thing; such as *reddendo*, *reservendo*, *solvendo*, *faciendo*, *inveniando*, or the like (*k*). So, a demise, "provided the lessee shall pay" a rent mentioned, is a good reservation (*l*). So, if a man demise, "in consideration of the rent thereafter mentioned," and the lessee covenant to pay a certain rent,—this, without any other *reddendum*, is a good reservation of the rent (*m*). But a demise, except 12*d.* or *præter* 12*d.* (*n*), or saving 12*d.* (*o*), is not a good reservation, because it does not imply a return of something which was not in the lessor before.

Where the lessee has been in possession under an agreement, or without it, for a time previous to the making of the lease, there is no objection to the *reddendum* as well as the *habendum* having express relation back to the time at which he first entered (*p*).

Frequently, in leases of farms, besides a reservation of the ordinary rent, there is a stipulation that if the lessor do a certain act,—as for instance, if he plough up ancient meadow during the last twenty years of the term, or the like,—he shall pay a certain increased rent. This is deemed a rent and not a penalty (*q*); and the lessor is entitled to it, and not merely to damages for the actual injury done to the land (*r*). And it will be no waiver of his right to it, that he had in fact received from the lessee the ordinary rent, with a full knowledge of the prohibited act being done (*s*). Where there was thus a reservation of 5*l.* per acre, during the last twenty years of a term, for every acre of meadow thereby demised which the tenant should plough, dig, break up, or convert into tillage; and before the commencement of the last twenty years, the tenant ploughed and converted into tillage a part of the meadow land, and continued it in tillage, after the commencement of the twenty years: the court held that the tenant was liable to pay the additional rent for the meadow which he continued in tillage after the commencement of the twenty years; and that he continued liable to pay it, to the end of the term, although long before the end of the term he had laid it down, and sowed it with clover, &c. (*t*). So, the tenant will be liable, although

(*k*) Co. Lit. 47. a. Perk. s. 625. Plowd. 142. 2 Ro. Abr. 449.

(*l*) 2 Ro. Abr. 449.

(*m*) 2 Ro. Abr. 449. Plowd. 131. Cro. Car. 207. Cro. Jac. 398. 2 Bulst. 281. W. Jon. 231.

(*n*) Perk. s. 639.

(*o*) 2 Ro. Abr. 449.

(*p*) See *McLeish v. Tate*, Cowp. 781.

(*q*) *Rolfe v. Peterson*, 2 Bro. P. C. 436. *Jones v. Green*, 3 Yo. & J. 298.

(*r*) *Farrant v. Olmins*, 3 B. & A. 692.

(*s*) *Denton v. Richmond*, 1 Cr. & M. 734.

(*t*) *Birch et al. v. Stephenson et al.*, 3 Taunt. 469. *Bowers v. Nixon*, 18 Law J. 35, qb.

the act done by him be good husbandry, according to the custom of the country, and there be a covenant in the lease that he shall cultivate the farm according to such custom (u).

Covenants.

The covenants in a lease, are the stipulations of the respective parties as to the terms upon which the lessor lets, and the lessee takes, the demised premises. They are either express or implied. We shall notice them here under the following heads:—

To pay rent.] In practice the lease always contains a covenant by the lessee to pay rent. But the like covenant may be implied from the words in the reservation, “yielding and paying,” &c. (v). By this covenant, the lessee is liable for the rent during the whole of the term, even although he assigns his interest to another; if an action be brought against him for it, he cannot even plead a tender of the rent by the assignee (w). And the lessor’s having accepted the assignee as his tenant, by receiving rent from him, makes little difference in this respect; it would be no defence whatever in covenant (x), although it would be a defence in debt for the rent, if the acceptance, or some assent of the lessor equivalent to it, were pleaded and proved, but not otherwise (y). As to covenants to pay additional rent in case the tenant should break up grazing land into tillage or the like, see *ante*, p. 36.

To repair.] Leases of houses or other buildings, usually contain a covenant on the part of the lessee to keep the premises in good and tenantable repair during the continuance of the demise, and to leave them in the like state of repair at the end, or other sooner determination of the term. In addition to this, there is also usually a covenant by the lessee to repair within a certain time after notice from the lessor, requiring him to do so. What shall be a breach of these covenants, we shall have occasion to state, when we come to consider the landlord’s remedies against his tenant for non-performance of his covenants. Where the lease, however, contains the general covenant, and the covenant to repair within a certain time after notice, and there is a breach by not keeping the premises

(u) *Greenalade v. Tapscott*, 1 Cr. M. & R. 55.

(v) *Peraon v. Jones*, 2 Ro. Rep. 391.

(w) *Orgill v. Kempshhead*, 4 Taunt. 442.

(x) *Barnard v. Godscall*, Cro. Jac. 309; Bul. N. P. 159.

(y) *Wadham v. Marlow*, 8 East, 314, n.; 1 H. Bl. 437, n.

in repair, the landlord is not bound to wait the time thus mentioned in the second covenant, before he brings an action for breach of the first (*a*), unless he have actually given notice under the second (*b*).

Not to commit waste.] A covenant to this effect is often introduced into leases of farms, and sometimes into leases of houses. It is generally construed to mean such waste only as may be injurious to the reversion, and not merely such as might be given in evidence under the old writ of waste, unless there be some stipulation in the lease to the contrary (*c*).

Not to assign or underlet, &c.] A covenant by the lessee not to assign his term to another, is very usual in leases, as well of farms, as of houses. But as the landlord by such assignment acquires an additional security for his rent and the performance of covenants, having the same remedies against an assignee that he would have against his lessee, and retaining still his remedies against his lessee,—the policy of introducing such a covenant may in many cases be questioned, at least without qualifying it, by allowing it if done by licence in writing of the lessor. A covenant not to underlet, admits of a different consideration; for although the landlord may distrain upon an under-tenant's goods upon the demised premises, for arrears of rent, he cannot maintain any action against him, there being no privity of contract or estate between them.

As a covenant not to assign, &c., has been holden not to extend to an assignment by act of law, unless that be made the subject of an express stipulation (*d*), it is very usual in leases, where the lessee is a trader and subject to the bankrupt laws, to introduce a proviso for re-entry, in case the tenant shall commit an act of bankruptcy whereon a fiat shall issue; and such a proviso is good in law, although it have the effect of preventing the interest in the term from passing to the assignees (*e*).

These covenants and provisos will be more particularly noticed in a subsequent part of the work, when we come to treat of the subject of forfeiture.

Not to carry on a particular trade, &c.] A very ordinary covenant on the part of the lessee, in leases of houses, is, that he shall not carry on any trade, or any particular trade specified, or allow of the same to be carried on, in the house demised.

(*a*) *Roe v. Paine*, 2 Camp. 520.

(*b*) *Doe v. Meux*, 4 B. & C. 606.

(*c*) See *Doe v. Bond*, 5 B. & C. 855, and *post*, tit. Forfeiture.

(*d*) See *Goring v. Warner*, 7

Vin. Abr. 85, pl. 9. *Doe v. Smith*,

5 Taunt. 795. *Doe v. Bevan*, 3 M.

& S. 353. *Doe v. Carter*, 8 T. R. 57, 300.

(*e*) *Roe v. Galliers*, 2 T. R. 133.

And where the covenant was, "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises or any part thereof, any trade or business whatsoever, without the licence of the lessor," &c. ; and the lessee, without the licence of the lessor, afterwards assigned the lease to a schoolmaster, who carried on his business of schoolmaster in the house and premises : it was holden that the assignment was a breach of the covenant (*f*).

To insure.] A very usual covenant on the part of the lessee, in all demises of property which may be insured by fire, is to insure the premises for a certain amount, either generally or in some particular insurance office, and usually in the name of the lessor ; with a covenant also, either that he will deposit the policy with the lessor, or that he shall produce and show it to him whenever he shall be required to do so. This we shall have occasion to notice more particularly hereafter.

As to the management of farms.] In leases of farms, there are usually a number of covenants upon the part of the lessee introduced, as to the manner in which the farm is to be managed, the course of cropping, the expenditure upon the farm of the manure, hay, straw, &c. made upon it, or that if hay or straw be removed, a certain quantity of manure, in proportion to it, shall be brought upon the farm, and the like. These, of course, must vary very much, in different counties, according to the course of husbandry adopted in them. Sometimes these covenants are introduced for the purpose of enforcing the mode of cultivation established by the general custom of good husbandry in the particular county or neighbourhood, and for preventing any litigation or difference in reference to the custom ; sometimes they are intentionally made to vary from such custom ; and in this latter case the covenant is holden to exclude and supersede the custom. And therefore where a tenant held under the terms of an expired lease, by which it was stipulated that the tenant, on quitting the farm, should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant, and the lease contained no stipulation as to the tenant being entitled to payment for such manure ; but by the custom of the country, although the tenant would be bound to leave the manure in like manner, yet he would be entitled to payment for it : it was holden that as an express stipulation had been made upon the subject, the custom was thereby excluded, and that the tenant was not entitled to be

(*f*) *Doe v. Keeling*, 1 M. & S. 95. See *Jones v. Thorne*, 1 B. & C. 715, *post*.

paid for the manure (*g*). But as far as the custom is not inconsistent with the express stipulations in the lease, it is deemed to be impliedly engrafted upon it, and to form part of the contract between the parties (*h*). And the courts will give such a construction to such covenants, as will best effectuate the intentions of the parties. A covenant by a lessee that he would well and sufficiently muck and manure the demised land with two sufficient sets of muck within the last six years of the term, the last set to be laid on the premises within three years of the expiration of the term,—was holden to be satisfied by the tenant's laying on two sets of muck within the last three years, if he should think proper to do so (*i*). Where a tenant stipulated to put out and spread all the manure in the middenstead, or on any other part of the farm or the meadow land, and that he would not sell, cart, or convey away dung, compost, or manure from the said farm; and a stranger, who had bought two cows in the neighbourhood, obtained permission of the tenant to leave them on his farm for some weeks, bringing provender from his own farm to feed them: it was holden that the manure made by these cows was within the meaning of the stipulation, and that the tenant, by allowing the stranger to remove such manure, rendered himself liable to an action by the lessor (*k*). Where a tenant covenants to leave the manure on the farm at the end of the tenancy, and to sell it to the incoming tenant at a valuation to be made by certain persons: the effect of this is, to give the outgoing tenant, although he have in other respects delivered up possession, a right of onstead for his manure upon the farm, and the possession of and property in it remain in him in the mean time; and if the incoming tenant remove and use it before such valuation, he is answerable to the other in trespass (*l*). On the other hand, if the outgoing tenant wish to remove it before such valuation, the incoming tenant, it seems, may lawfully prevent him from doing so. Where a tenant covenanted to consume all the hay upon the farm, or for every load of hay removed from it to bring two loads of manure to it; and after leaving the farm at the end of the term, he sold the hay then upon it, without bringing manure instead of it, according to his covenant: it was holden that although the bringing of the manure was not a condition precedent to the removing of the hay, as between the outgoing tenant and his landlord, yet that the incoming tenant might refuse to allow the other or his vendee to remove it, until the manure for it

(*g*) *Roberts v. Barker*, 1 Cr. & M. 808.

(*h*) *Hutton v. Warren*, 1 Mees. & W. 466.

(*i*) *Pownall v. Moores*, 5 B. & A. 416.

(*k*) *Hindle v. Pollett*, 6 Mees. & W. 529.

(*l*) *Beaty v. Gibbs*, 16 East, 116.

were first brought upon the farm (*m*). Where the lessee covenanted to permit and suffer his landlord, during the last year of the tenancy, to enter upon the farm, and to sow clover and grass seeds with the lessee's barley and oats; and in an action on this covenant, the lessor stated as a breach, that although the tenant in the last year sowed twenty acres of the farm with barley, and twenty acres with oats, yet he gave him no notice thereof, whereby he was prevented from sowing the clover and grass seeds: the court held that this was no breach of the covenant, which made no mention whatever of any notice; if, indeed, the lessee had refused to give him notice, it might be otherwise (*n*). As to covenants for the payment of an additional rent, if the tenant cultivate the land in a different manner from that stipulated, see *ante*, p. 36.

Usual covenants.] In agreements for leases, and in powers of leasing, it is very often stipulated that the lease, when prepared, shall contain all usual and customary covenants. What are to be deemed usual covenants then becomes a question, and very often depends upon the custom or usage in that respect in the county or neighbourhood where the premises are situate, often upon the nature of the property itself. What are usual covenants, is a question of fact, not of law (*o*). Where the agreement is for a net rent, a covenant that the tenant shall pay land-tax, sewers-rate, and all other taxes, is an usual covenant (*p*). And in the lease of a public-house, a proviso for re-entry if any other business but that of a victualler should be carried on in it, was holden to be an usual covenant, it being proved that six out of every ten of such leases contained such a covenant (*q*). But in other cases, a restriction against carrying on trade generally, or any particular trade, upon the demised premises, is not an usual covenant (*r*). Nor is a covenant not to assign without licence an usual covenant (*s*). On the other hand, under a power to a tenant for life to lease for years, with the usual covenants, provisos, &c., a lease containing a proviso that in case the premises should be blown down or burnt during the tenancy, the lessor should rebuild them, or otherwise the term should cease,—was holden not to be an usual proviso, within the meaning of the power (*t*).

(*m*) *Smith v. Chance*, 2 B. & A. 753.

(*n*) *Hughes v. Richman*, Cowp. 125.

(*o*) *Bennett v. Womack*, 3 Car. & P. 106.

(*p*) *Bennett v. Womack*, 7 B. & C. 627.

(*q*) *Id.*

(*r*) *Propert v. Parker*, 3 Mylne & K. 280.

(*s*) *Henderson v. Hay*, 3 Bro. C. C. 632. *Church v. Brown*, 15 Ves. 258. *Vere v. Lovenden*, 12 Ves. 179. *Jones v. Jones*, *Id.* 186. But see *Morgan v. Slaughter*, 1 Esp. 8.

(*t*) *Doe v. Sandham*, 1 T. R. 705.

Implied covenants.] A covenant by the lessee to pay rent, may be implied from the words, "yielding and paying" in the reddendum (*a*). From the words "*concessi*" or "*demisi*" a covenant for quiet enjoyment may be implied (*b*); but it must be understood to extend only to an eviction by one who hath title (*c*). Where a lessee covenanted that he would at all times during the term plough, sow, manure and cultivate the demised lands, except the rabbit-warren and sheep-walk, this was holden to amount to an implied covenant not to plough the rabbit-warren or sheep-walk (*d*). But no warranty or covenant by implication shall arise from the words "give" or "grant," in any deed executed after the 1st October, 1845 (*e*). And in cases where a covenant may be implied, if there be an express covenant in the lease, upon the same subject, the parties are restrained by the terms of the express covenant, and cannot maintain an action on the implied one (*f*). In all cases where a covenant may thus be implied, it is treated precisely as if it were expressed in the lease, and sued upon as such.

Stamps on Leases.

If a written lease be given in evidence, it must be correctly stamped. The following are the stamps required upon leases by stat. 13 & 14 Vict. c. 97, sch.:—

Lease of any lands, tenements or hereditaments, granted in consideration of a sum of money by way of fine or premium paid for the same, without any yearly rent, or with any yearly rent, under 20*l.*:—the same duty as for the conveyance on the sale of lands for a sum of money of the same amount.

(*Save and except leases for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, by whomsoever granted, and leases for a term absolute not exceeding twenty-one years, granted by ecclesiastical corporations, aggregate or sole, where the duties on such leases would, under the provisions of this Act, amount to 1*l.* 15*s.* or upwards.*)

Lease of any lands, tenements or hereditaments, at a yearly rent, without any sum of money by way of fine or premium paid for the same—

(*a*) *Person v. Jones*, 2 Ro. Rep. 399. Ro. Abr. 519. Styl. 387, 406, 481. Bac. Abr. Covenant B. Carth. 97, 232. Comb. 163. And see *Hinde v. Gray*, 1 M. & Gr. 195.

(*b*) *Spencer's Case*, 5 Co. 17 a. Ro. Abr. 520. Cro. Jac. 73.

(*c*) 2 Leon. 104. Cro. El. 214. 2 Brownl. 161.

(*d*) *Duke of St. Albans v. Ellis*, 16 East, 352.

(*e*) 8 & 9 Vict. c. 106, s. 4.

(*f*) *Merril v. Frame*, 4 Taunt. 329. *Line v. Stephenson et al.*, 5 Bing. N. C. 183. 4 Id. 678. *Stannard v. Forbes et ux.*, 6 Ad. & El. 572.

	£		£	s.	d.
Where the yearly rent shall not exceed	5	.....	0	0	6
And where the same shall exceed £5 and not exceed	10	.....	0	1	0
	10	—	15	.....	0 1 6
	15	—	20	.....	0 2 0
	20	—	25	.....	0 2 6
	25	—	50	.....	0 5 0
	50	—	75	.....	0 7 6
	75	—	100	.....	0 10 0

And where the same shall exceed 100*l.*, then for every 50*l.*, and also for any fractional part of 50*l.* 0 5 0

But no *ad valorem* duty shall be charged in respect of a penal rent, or increased rent in the nature of a penal rent.

Lease of any lands, tenements or hereditaments, granted in consideration of a sum of money by way of fine or premium, and also of a yearly rent amounting to 20*l.* or upwards:—Both the *ad valorem* duties payable for a lease in consideration of a fine only, and for a lease in consideration of a rent only of the same amount.

(*Save and except the leases hereinbefore excepted.*)

Lease of any kind, not otherwise charged in this schedule - - - - - 1 15 0

As to leases of mines, and leases at corn rents, see the schedule to the statute.

If the lease be of several parcels, at different rents, it may be deemed as one letting, and does not require a separate stamp for each rent (g).

An instrument purporting to be a lease, if not signed or executed by the lessor, does not require a stamp as such (h).

Where an unstamped lease is afterwards stamped by order of the commissioners, it is the stamp which is required by law at that time that must be affixed to it; and this will be deemed sufficient, although a greater stamp would have been required at the date of the instrument (i).

Where a lease contains also an agreement relating to some collateral matter, it must also have an additional stamp applicable to such matter (k).

Entry of Lessee.

The lease of itself vests in the lessee no estate whatever in the demised premises; it merely gives him an *interesse termini*,

(g) *Boss v. Jackson*, 3 Brod. & B. 185. *Blount v. Pearman*, 1 Bing. N. C. 408.

(i) *Buckworth v. Simpson et al.*, 1 Cr. M. & R. 834.

(h) *Wharton v. Walton*, 14 Law

(k) *Doe v. Wiggins*, 4 Q. B. 367. J. 321, qb.

a right to enter upon and take possession of them. So that to complete the title of the lessee, he must actually enter upon the demised premises; before entry, he is not possessed, and cannot maintain trespass for any entry upon or injury to the land demised. In the mean time, however, he is bound by his contract, and must perform all the covenants in his lease; otherwise the lessor will be entitled to his remedies against him.

Where the term is to commence *in futuro*, if the lessee enter before that time, he is a disseisor, and the lessor may maintain ejectment against him (*l*). But if he do not enter before or on the day his term commences, he may do so at any time afterwards, within twenty years from the time his right of entry accrued. And having entered, and obtained possession, he thereby is entitled to hold the demised premises, not only against all strangers not having title, but against his lessor, and all persons claiming title under him. Where A. let lands to B. for one hundred years, to secure an annuity, and subject thereto, he afterwards let the same lands to C. for two hundred years, to secure another annuity; C. entered, B. did not, and in two years afterwards D. extended the lands under an elegit against A., upon a judgment signed after the entry of C., and took possession: in trespass by C. against D., the court held that the action well lay; by his entry he acquired the actual possession, and a right to the possession as against all persons except B.; and D. could acquire no right by his elegit, except subject to the respective rights of B. and C. (*m*).

Form of Lease of a Dwelling-house.

This indenture, made the — day of —, A. D. 18—, between J. S. of —, of the one part, and J. N. of —, of the other part. Whereas the said J. N. hath agreed with the said J. S. for a lease of the messuage and premises hereinafter described, for the term of — years, from the — day of — next, under and subject to the rents and covenants hereinafter reserved and contained: Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the yearly rent hereinafter reserved, and of the covenants and agreements hereinafter contained on the part of the said J. N., his executors, administrators, and as-

signs, to be respectively paid, observed, and performed, [and also of the sum of five shillings to the said J. S. in hand paid by the said J. N. at the time of the sealing and delivery of these presents, the receipt whereof is hereby acknowledged,] he the said J. S. hath granted, bargained, sold, demised and leased, and by these presents doth grant, bargain, sell, demise and lease, unto the said J. N., his executors, administrators and assigns (the assigns of the said J. N. being with such licence and consent as hereinafter is mentioned), all that messuage or tenement and dwelling-house, situate [&c., except, &c.] Together with all and

(*l*) Bac. Abr. Lease, P.

(*m*) *Chatfield v. Parker*, 8 B. & C. 543.

singular the outhouses, buildings, coach-houses, barns, stables, dove-houses, yard, cellars, areas, vaults, benefit and advantage of ancient and other lights, ways, paths, passages, drains, pipes, waters, water-courses, lawful and customary rights and privileges of common of every kind, and all and every other rights, privileges, advantages, easements, and appurtenances whatsoever, to the said messuage or tenement and premises belonging or in anywise appertaining, or with the same or any part thereof now or heretofore lawfully or usually holden, used, occupied or enjoyed: To have and to hold the said messuage or tenement, dwelling-house, and all and singular other the premises hereby demised or otherwise assured or intended so to be, with the several rights, members, and appurtenances, unto the said J. N., his executors, administrators, and assigns, (such assigns being with the licence hereinafter mentioned,) from the — day of —, now next ensuing, for and during the full and complete term of — years from thence next ensuing; Yielding and paying for the same yearly and every year during the said term (except as hereinafter is mentioned) unto the said J. S., his heirs and assigns, [or his executors, administrators, and assigns,] the clear yearly rent or sum of £ —, of lawful money of Great Britain, by equal quarterly payments on the — day of —, the — day of —, the — day of —, and the — day of —, in each and every year, during the said term, free and clear of and from all manner of parliamentary, parochial, and other taxes, rates, assessments, deductions, or abatements whatsoever, whether now or at any time hereafter to be imposed upon or payable in respect of the said premises or any part thereof, and whether any such future taxes, rates or assessments shall be in the nature of those now in being or not (the land-tax and sewers-rate only excepted), the first quarterly payment of the said yearly rent or sum to be made on the — day of — next ensuing the date of these presents.

And the said J. N., for himself, his heirs, executors and administrators doth hereby covenant, pro-

mise, and agree to and with the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] in the manner following, (that is to say) that he the said J. N., his executors, administrators and assigns, shall and will from time to time and at all times during the continuance of the said term hereby granted, well and truly pay or cause to be paid unto the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] the said yearly rent or sum of £ — of lawful money aforesaid, upon the several days and times, and in the manner hereinbefore appointed or mentioned for payment thereof;

And also well and truly pay, satisfy, and discharge, all and all manner of taxes, rates, duties, assessments and impositions whatsoever, whether parliamentary, parochial or otherwise, which now or at any time hereafter during the said term are or may be payable, for or in respect of the said premises, or of the yearly rent hereby reserved, and whether any future taxes, rates, duties or assessments shall be in the nature of those now in being or not, (the land-tax, landlord's property tax and sewers-rate only excepted);

And also that he the said J. N., his executors, administrators and assigns, shall and will, at all times, and from time to time during the continuance of the said term hereby demised, well and substantially repair and maintain, and keep in repair with good materials at his and their own proper expense and costs, all and every part of the messuage, tenement or dwelling-house and premises hereby demised, together with the glass and other windows, window-shutters, doors, locks, fastenings, bells, partitions, ceilings, floors, chimney-pieces, pavements, privies, sinks, drains, cesspools, cisterns, pumps, wells, pipes, and watercourses thereunto belonging; and also all such fixtures, buildings, improvements and additions whatsoever, as at any time during the said term shall be erected or made by him the said J. N., his executors, administrators or assigns, upon the said premises or any part thereof;

And also bear, pay, and discharge a reasonable share and proportion

of the charges and expenses of making, supporting, repairing, and amending all party walls and gutters, which now are or at any time hereafter during the said term shall belong to the said premises or any part thereof;

And, moreover, shall and will paint or cause to be painted, in good and proper oil colour, all and every the outer doors, gates, rails, window-frames, and other the outside wood and iron work of the said premises, at the end of the first — and — years of the said term, and paper and whitewash in a good and workmanlike manner, at the end of the first — and — years of the said term, all and singular such part of the said premises as are respectively now painted, papered, and whitewashed;

And further, that he the said J. N., his executors, administrators or assigns, shall and will insure or cause to be insured, at his and their own proper costs and expense, during the said term, all and singular the messuage, tenement, or dwelling-house hereby demised, and other the erections and buildings aforesaid, against loss by fire, in the — insurance office, or in some other office for insurance against fire to be approved of by the said J. S., his heirs or assigns [*or his executors, administrators or assigns,*] in the joint names of the said J. S., his heirs or assigns, [*or his executors, administrators and assigns,*] and of the said J. N., his executors, administrators or assigns, for and in the full sum of £— at the least. And also shall and will, upon every reasonable request of the said J. S., his heirs or assigns [*or his executors, administrators or assigns,*] produce unto him or them the policy, receipt and other vouchers, of or for such insurance; and in default of making such insurance as aforesaid, or in producing the said policy or vouchers, it is hereby declared and agreed that the said J. S., his heirs or assigns, [*or his executors, administrators or assigns,*] shall be at liberty to effect the same in the aforesaid sum, and charge the premium and duty payable from time to time on account thereof to the said J. N., his executors, administrators and assigns, with interest after the rate

of five per cent. per annum from the time of paying the same; and that he the said J. N., his executors or administrators, shall and will repay the same to the said J. S., his heirs and assigns [*or his executors, administrators and assigns,*] at the then next quarter-day for the payment of the rent hereinbefore reserved. And in case the said messuage or tenement and premises, or any part thereof, shall at any time during the said term be destroyed or damaged by fire, then and as often as the same shall happen, all such sums of money as shall be paid by the proprietors of the said insurance office, by virtue or in consequence of any such policy or policies of insurance, shall forthwith or with all convenient speed be laid out and applied in and towards the substantially rebuilding, reinstating, repairing, and making fit for habitation, such parts of the said premises as shall be so destroyed or damaged as aforesaid. And in case the sum or sums of money which shall be paid by the proprietors of the said insurance office shall not be sufficient for that purpose, then and in such case he the said J. N., his executors, administrators or assigns, shall and will out of his or their own proper monies pay and make good any deficiency therein. And it is further agreed that no abatement or suspension of the rent hereby reserved or any part thereof shall be made to or required by the said J. N., his executors, administrators or assigns, for or on account of any such accident by fire as aforesaid, or on account of the said premises being rendered incapable of being occupied by means thereof, or during the rebuilding or reparation of the same, or on any other account whatsoever relating thereto.

Provided always, and it is hereby further declared and agreed, that it shall be lawful for the said J. S., his heirs or assigns, [*or his executors, administrators and assigns,*] or his or their surveyor, either alone or with workmen and others, twice in every year during the said term (or oftener, if he or they shall see occasion), at seasonable times in the day-time [and on giving one day's previous notice thereof to the said J. N., his executors, administrators or assigns,] to enter into and upon

the messuage, tenement, or dwelling-house and premises hereby demised, or any part of the same, for the purpose of viewing and examining the state and condition thereof, or taking a schedule or inventory of the fixtures then being thereupon; And that in case any defects or want of reparation of the said premises or any part thereof, or any removal of fixtures, shall be there found or appear, he the said J. N., his executors, administrators or assigns, shall and will, upon notice thereof in writing being given to him or them by the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] cause the same premises to be forthwith well and substantially repaired or amended in all things, and the said fixtures reinstated and replaced.

And the said J. N. doth, in manner and form aforesaid, further covenant and declare, that he the said J. N., his executors, administrators or assigns, shall not nor will, at any time during the continuance of the term hereby granted, use, exercise or carry on, nor permit or suffer to be used, exercised or carried on, in or upon the messuage or tenement and premises hereby demised or any part thereof, any [or either of the trades or businesses of vintner, distiller, brewer, fruit-seller, herb-seller, coffee-house or tavern keeper, ale-house keeper, victualler, tripe-boiler, butcher or seller of tripe or meat, baker, pastry-cook, poulterer, fishmonger, cheesemonger, household broker, dealer in old iron, farrier, working hatter, working cutler, chimney sweeper, bagnio keeper, coach-maker, soap-boiler, tallow-chandler, tallow-melter, sugar-baker, blacksmith, whitesmith, copper-smith, working brazier, tinman, plumber, dyer, or any other] noxious, noisly or offensive trade or business whatsoever, without the consent in writing, under the hand of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] obtained for that purpose; nor, without the like consent, make or cause or suffer to be made at any time during the said term, or at or upon the expiration thereof, any public sale or auction of household goods, or other things in or upon the said demised

premises, or any part thereof, nor convert the said premises or any part thereof into a shop, warehouse, shed for the sale of coals, potatoes, vegetables or victuals of any kind whatsoever, without such consent in writing as aforesaid.

And also, that he the said J. N., his executors, administrators or assigns, shall not nor will, during the term hereby granted, give, demise, let, assign, set over, or otherwise part with, (except by his last will or testament,) or cause or procure to be given, granted, demised, let, assigned, or set over, either by the act, deed, permission, or sufferance, or default of him or them, the present indenture of lease, or the premises hereby demised or any part thereof, or his or their estate, term or interest therein, or any part of the same, unto any person or persons whomsoever, without the consent and licence of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] first had and obtained under his or their hand or respective hands, for that purpose; and it is hereby further declared and agreed that such licence, if obtained, shall not extend or be deemed or construed to extend (unless the same be generally and unrestrictedly given) to any future assignee or lessee of the said premises or any part thereof, or be considered as a waiver of the present covenant for restraining the assignment, under-letting, or disposing of the said premises, but shall from time to time, as and when the same shall be given, be limited, confined and restricted to the particular person therein named, and to other the terms and true intent and meaning thereof, any rule of law or equity to the contrary notwithstanding. Provided always, nevertheless, that the proviso or agreement hereinbefore last contained, is and is hereby declared to be meant and intended to and for the sole end and intent that the said messuage or tenement and premises may not be assigned or letten unto, or become the property of any indigent or other improper person or persons, and not to restrain or prevent the said J. N., his executors, administrators, or assigns, from assigning, letting, parting with or disposing of the said

premises, or any part thereof, or any estate or interest therein, to any respectable and responsible person or persons who may be desirous of taking the same; and that the said J. S., his heirs or assigns, shall not, nor will arbitrarily and without good and sufficient cause assigned, withhold such consent as aforesaid, nor shall nor will demand or require any sum of money, reward, premium or gratuity for giving or granting the same.

And moreover the said J. N. doth hereby covenant, declare and agree with and to the said J. S., his heirs and assigns, [*or* his executors, administrators and assigns,] that it shall be lawful for him and them, or his or their servants or agents, at any time or times within the last three months next preceding the expiration of the said term of — years hereby demised, to affix or set up a printed or other notice upon any conspicuous part of the said demised premises (not being upon any window or door thereof) that the said premises will be to be let at the expiration of the said term; and also at any seasonable time in the day-time to enter into and upon the said demised premises, or any part thereof, to shew the same to any person or persons who may be desirous of viewing the same.

And lastly, that he the said J. N., his executors, administrators and assigns, shall and will, at the expiration or other sooner determination of the said term of — years hereby granted, peaceably and quietly leave, surrender, and yield up unto the said J. S., his heirs or assigns, [*or* his executors, administrators or assigns,] or to whomsoever else he or they shall direct, all and singular the said messuage or tenement, dwelling-house and premises hereby demised, together with the several fixtures and other things mentioned in the schedule hereunder written or hereunto annexed, and also all other fixtures which shall then be thereupon or thereunto belonging (ranges, stoves, bells, and other things belonging to the said lessee, his executors, administrators or assigns only excepted) in a good state of repair and condition in all things, (reasonable allowance being

made for the use and wear thereof,) and that without any notice being given to or required by him or them for that purpose, and in default of his or their so peaceably and quietly leaving, surrendering, and yielding up possession of the said premises as aforesaid, he the said J. N., his executors, administrators and assigns shall and will well and truly pay unto the said J. S., his heirs or assigns, [*or* his executors, administrators or assigns,] double the actual value of the said premises for so long a time as he or they shall continue in possession thereof (the same to be paid at the days and times hereinbefore appointed for the payment of the yearly rent of £ — hereby reserved); and that all and every the covenants, provisions and agreements herein contained, on the part of the said J. N., his executors, administrators and assigns, to be observed or performed, shall continue and be obligatory and binding upon him and them in the same manner to all intents and purposes as if the term of — years hereby granted were still in continuance and unexpired.

Provided always, and these presents are upon this express condition nevertheless, that if the said yearly rent or sum of £ —, hereinbefore reserved or made payable, or any part thereof, shall be in arrear and unpaid for the space of twenty-one days next after any of the days or times hereinbefore appointed for the payment thereof, and the same shall be lawfully demanded upon or at any time after the expiration of the said twenty-one days, and shall not upon such demand be fully paid up and satisfied;—or if the said J. N., his executors, administrators or assigns, do or shall permit or suffer to be carried on upon the said demised premises, any of the offensive or other trades or businesses hereinbefore mentioned;—or do or shall assign, let, set over or otherwise part with the said premises, or his or their estate or interest therein or any part of the same, contrary to the covenants and agreements hereinbefore contained,—or shall neglect or fail in the performance or observance of any other the covenants and agreements herein-

before contained which by him or them are to be performed or observed, according to the true intent and meaning of the same respectively,—then and from thenceforth, and in either of the said cases, the covenant for quiet enjoyment hereinafter contained shall wholly cease and be void, and the said J. S., his heirs and assigns, [or his executors, administrators or assigns,] shall or lawfully may, immediately upon or at any time after any such breach, non-observance, or non-performance, enter into and upon the premises hereby demised, or any part thereof in the name of the whole, and repossess, retain, and enjoy the same, as of his and their former estate, and as if these presents had not been made, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding.

And the said J. S. for himself, his heirs, executors and administrators, doth covenant and declare to and with the said J. N., his executors, administrators and assigns, by these presents, in manner following, (that is to say,) that he the said J. S., at the time of the sealing and delivery hereof, hath full and lawful power and authority to grant and demise the messuage or tenement and premises hereby demised, leased or otherwise assured, or intended so to be, at, for, and upon the rent, term and conditions hereinbefore reserved and contained respecting the same, and according to the true intent and meaning of these presents;

And that he the said J. N., his executors, administrators and assigns, paying the yearly rent hereby reserved at and upon the days and times and in the manner hereinbefore appointed for payment thereof, and performing and observing the covenants and agreements hereinbefore contained by

him and them to be performed and observed, shall and lawfully may peaceably and quietly have, hold, use, occupy and enjoy the same messuage or tenement and premises, with their respective rights, members and appurtenances, for and during the term of — expressed to be hereby granted thereof, without any lawful denial, let, hindrance, molestation, or interruption whatsoever, of or by him the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or any other person or persons whomsoever.

And moreover, that he the said J. S., and his heirs, [or executors or administrators,] and all and every person or persons so claiming or entitled as last aforesaid, shall and will, from time to time and at all times hereafter during the term of — years hereby granted as aforesaid or intended so to be, upon every reasonable request, and at the cost and expense, of the said J. N., his executors, administrators and assigns, make, do, execute and perfect, with all reasonable dispatch, all and every such further and other lawful and reasonable acts, deeds, conveyances, matters and things whatsoever, for the further, better and more perfectly or satisfactorily demising, leasing, assuring and confirming the said messuage or tenement and premises hereby demised or mentioned or intended so to be, unto the said J. N., his executors, administrators and assigns, for and during all the residue and remainder which shall be then to come and unexpired by effluxion of time, of or in the said term, as he the said J. N., his executors, administrators or assigns, or his or their counsel learned in the law, being of the degree of a barrister, shall reasonably require.

In witness, &c.

Lease of a Farm.

This indenture made the — day of —, A. D. 18—, Between J. S. of —, of the one part, and J. N. of —, of the other part: Whereas the said J. N. has agreed with the said J. S. for a lease of the messuage, farm, and lands hereinafter

described, for the term of — years, from the — day of —, under and subject to the rent and covenants hereinafter contained: Now this indenture witnesseth, that for and in consideration of the rent hereinafter reserved, and of the co-

venants and agreements hereinafter contained on the part of the said J. N., his executors, administrators and assigns, to be paid, observed and performed respectively, he the said J. S. hath granted, demised, leased, and to farm let, and by these presents Doth grant, demise, lease, and to farm let, unto the said J. N., his executors, administrators and assigns (such assigns being to be approved of as hereinafter mentioned), all that messuage or tenement and farm-house situated [&c.] called or known by the name of —, together with the arable, meadow, and pasture land thereto belonging, containing in the whole by estimation — acres, be the same more or less, as the same were late in the tenure or occupation of —;

Except and always reserved out of this present demise unto the said J. S., his heirs and assigns [*or* his executors, administrators and assigns], all timber and timber-like trees, and trees likely to become timber, and all other trees whatsoever, whether now standing or being, or which hereafter during the said term shall be standing or being, upon the said demised premises or any part thereof, (except pollard and such other trees as have heretofore been usually lopped and topped, or paired or pruned, so far as relates to the loppings and tops thereof, and orchard and other fruit trees in respect of the fruit or annual produce thereof);

And also all mines, minerals quarries, marle, clunch and gravel pits, rivers and ponds, in or upon the same (other than as hereinafter mentioned);

And also the whole and sole right of killing game upon the said lands;

With liberty of ingress, egress and regress for the said J. S., his heirs or assigns, [*or* his executors, administrators and assigns,] in, over and upon the said premises, to fell, saw, lop, top, root-up, and carry away the said timber and other trees, except as aforesaid, and dig and work the said mines, quarries, and pits, and the produce and product thereof, with servants, workmen, horses, carts and carriages, or otherwise howsoever. And also free liberty to plant trees, layers, and quicksets, and acorns or other

seeds or plants in the several banks or hedge-rows, in, upon or belonging to the demised premises, with like ingress, egress, and regress, to and for the said J. S., his heirs or assigns, [*or* his executors, administrators or assigns,] to fence the same,—and to stock and replenish the fish and other ponds and waters,—and from time to time to view and see the state and management thereof respectively; and also free liberty, licence and leave to and for the said J. S., his heirs and assigns, [*or* his executors, administrators and assigns,] and his and their friends, game-keepers, followers and servants, or any person or persons authorized by him in that behalf, to hunt, hawk, course, shoot, and sport in, over and upon the said demised lands and premises, and to fish in the ponds and waters thereof, at all seasonable times during the said term, and also to go into, upon or over the said premises, or any part thereof, upon or for any other reasonable purpose or occasion whatsoever, doing thereby no wilful or unnecessary injury or damage to the corn, grass, hay, woods, or fences of the said J. N., his executors, administrators or assigns:

To have and to hold the said messuages or tenement, farm, lands and premises, hereby demised and leased or mentioned or intended so to be, with their appurtenances, unto the said J. N., his executors, administrators and assigns (such assigns being so approved of as hereinafter mentioned), from the — day of — now last passed, for and during the full and complete term of — years thence next ensuing: Yielding and paying for the same yearly, and every year, during the said term, unto the said J. S., his heirs or assigns, the rent or sum of £— of lawful money of the United Kingdom, by equal quarterly payments, on the — day of —, the — day of —, the — day of —, and the — day of —, in every year, the first payment thereof to commence and be made on the — day of — next ensuing the date of these presents;

And also yielding and paying unto him and them, yearly and every year during the same term,

by way of liquidated damages, and not for or by way of penalty or in terrorem, the further yearly rent or sum of £—, on the days and times aforesaid, for every acre of meadow or pasture land or ground which he the said J. N., his executors, administrators or assigns, shall plough, dig, break up or otherwise convert into tillage, and for every acre of land (whether meadow, pasture, arable or other land or ground) which he or they shall husband or manage contrary to the covenants and agreements hereinafter contained, and so in proportion for any greater or less quantity than an acre;

And also yielding and paying unto the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] over and above and in addition to the several yearly rents, and other sums hereinbefore reserved or made payable, such sum or sums for or in the nature of rent as shall be equal to or after the rate of five per cent. per annum, for or upon all and every or any sum or sums which the said J. S., his heirs or assigns, [or executors, administrators or assigns,] shall, from time to time or at any time or times during the said term, lay out or expend by or with the consent of the said J. N., his executors, administrators or assigns, in inclosing, draining, fencing, building or other improvements in, upon or about the said farm and premises or any part thereof, the first payment of the said further or additional rents or sums to be made on such of the said days of payments of the first or principal rent hereinbefore reserved, as shall next happen after any such conversion or expenditure as aforesaid;

All and every which said first and further and other rent or rents hereby reserved, are and shall be paid and payable free and clear of and from all and all manner of parliamentary, parochial and other taxes, rates, assessments, deductions and abatements whatsoever, [whether already or at any time or times hereafter to be imposed or payable for, upon or in respect of the said premises, or any part thereof, or the yearly rent hereby reserved or any part thereof.

or chargeable upon the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] for or in relation to the same, and whether any future taxes, rates or assessments shall be in the nature of those now in being, or not, the land-tax, landlord's property tax and sewers-rate if any, payable by or assessable upon the landlord of the said premises for the time being in respect thereof, only excepted.

And the said J. N., for himself, his heirs, executors, and administrators doth hereby covenant, promise and agree with and to the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] that he the said J. N., his executors, administrators and assigns, shall and will, from time to time, and at all times during the continuance of the said term hereby granted, well and truly pay or cause to be paid unto the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] the said yearly rent or sum of £—, and also the said several additional rents or annual sums hereinbefore respectively reserved or made payable, in lawful money aforesaid, upon the several days and in the manner hereinbefore mentioned or appointed for payment thereof, and according to the true intent and meaning of these presents. And also that the said additional sums shall not be taken or considered as penal sums, but as settled and liquidated payments or damages and rent, any rule of law or equity to the contrary notwithstanding. And also that the receipt of the said (J. S.), his heirs, assigns or agents, for the said yearly rent of £—, shall not be any bar or preclusion for his recovering any or either of the said additional rents incurred at or for any year or time, not exceeding three years from the time of the same having been incurred.

And also well and truly pay, satisfy and discharge all and all manner of taxes, rates, duties, assessments and impositions whatsoever, whether parliamentary, parochial or otherwise [and whether the same now are, or shall or may, at any time hereafter, during the continuance of the said term, be lawfully assessed or imposed upon,

or payable for or in respect of the said demised premises or any part thereof, or the yearly rent hereby reserved or any part thereof, or chargeable upon the said J. S., his heirs or assigns, [*or his executors, administrators or assigns,*] in respect thereof,] and whether any such future taxes, rates, duties or assessments shall be in nature of those now in being or not, (the land-tax, sewers-rate, and landlord's property-tax aforesaid only excepted);

And also that he the said J. N., his executors, administrators and assigns shall and will, at all times and from time to time, during the continuance of the term hereby demised, well and substantially repair and keep repaired, in a workmanlike manner and with good materials, at his and their own proper expense and costs, (accidents and damage happening by fire only excepted,) all and every the messuage or tenement and dwelling-house hereby demised, and all and every the glass and other windows, window-shutters, doors, locks, fastenings, bells, partitions, ceilings, floors, chimney-pieces, shelves, pavements, privies, sinks, drains, cesspools, cisterns, pumps, wells, pipes and watercourses to the same belonging, and also all and every the outhouses, barns, stables, dovecotes, sheds, hovels, and other erections and buildings whatsoever, and gates, posts, rails, stiles, hedges, ditches, banks, fences, bridges, and enclosures, in, upon or belonging to the said farm, lands and premises, together also with all buildings, improvements and additions whatsoever, which at any time during the said term shall be erected or made upon the said demised premises or any part thereof; [and shall and will, at his and their like costs, from time to time find and provide timber and all other materials requisite for repairing the same premises, without having any allowance made to him or them for the same].

And further, that he the said J. N., his executors, administrators or assigns, shall and will, within the space of — days next ensuing the date hereof, at his and their own expense, and from time to time during the continuance and until the expiration of the term

hereby granted, well and sufficiently insure or cause to be insured, in some or one of the public offices in the city of London or Westminster for insuring houses from casualties by fire, all and every the messuages or tenements, barns, stables and buildings hereby demised, in the full sum of £—— at the least, and also so much of the stock upon the said farm as shall be equal to one half year's rent, and shall and will, from time to time, at the request of the said J. S., his heirs or assigns, [*or executors, administrators or assigns,*] produce the policy for such insurance, and the receipts for the premium paid thereon, and in default of making or continuing such insurance, or of producing the said policy or receipts, the said J. S., his heirs or assigns, [*or his executors, administrators or assigns,*] shall be at liberty to insure the same in or to the amount aforesaid, and charge the said J. N., his executors, administrators and assigns, with the premium and duty payable from time to time thereupon, with interest after the rate of five per cent. per annum from the time of paying the same, which said premium or duty and interest the said J. N. doth hereby agree to pay the said J. S., his heirs or assigns, [*or his executors, administrators or assigns,*] at the quarter day then next for the payment of the rent hereinbefore reserved; And in case the said messuage or tenement, buildings and premises, or any part thereof, shall at any time during the said term be burnt down, destroyed or damaged by fire, then all such sum and sums of money which shall be paid by the proprietors of the said insurance office, by virtue or in consequence of any such policy or policies of insurance, shall forthwith or with all convenient speed be laid out and applied in and towards rebuilding, reinstating and repairing the same (as the case may require), in a substantial and workmanlike manner. And in case the money which shall be paid by the proprietors of the said office, by virtue of any such policy or policies of insurance, shall not be sufficient for the rebuilding, reinstating or repairing the messuages or buildings, which shall happen to

be destroyed, burned or damaged by fire, then and in such case he the said J. N., his executors, administrators or assigns, shall and will advance and pay such sum of money as, with the sum which shall be paid by the proprietors of the said office for or in consequence of any such policy or policies of insurance as aforesaid, will be sufficient for rebuilding or substantially repairing the same, and shall and will cause and procure the same to be paid and expended accordingly; And it is further agreed and declared, that no abatement of the rent hereby reserved, or any part thereof, shall be made or required by the said J. N., his executors, administrators or assigns, for or on account of any such accident by fire as aforesaid, or on account of the said premises being rendered incapable of being occupied by means thereof, or during such rebuilding or reparation of the same, or on any other account whatsoever, but the same shall be payable and paid, in like manner as if no such accident or damage had happened;

Provided always nevertheless, and it is hereby agreed, that if all or any of the buildings hereby demised shall happen to be blown down or destroyed by high winds, storm or tempest, but not otherwise, he the said J. S., his heirs and assigns, [or his executors, administrators or assigns,] shall and will from time to time, at his and their costs, rebuild and reinstate the same in a proper and workmanlike manner, and as soon as conveniently may be thereafter.

And the said J. N. doth hereby, in the manner and form aforesaid, further covenant, declare and agree, that he the said J. N., his executors, administrators or assigns, also shall or will, from time to time during the said term, make anew the quick and other hedges, ditches and fences of or belonging to the said premises, or such parts of the same as shall require to be new made, in a good and husbandlike manner, and at proper seasons in the year, leaving within or on each side of the said quick hedges, such wood as shall be most proper and be sufficient for sleepers or layers, and well and properly lay down the

same for such sleepers or layers, and ditch, bank-up, and fence the same hedges and every of them on either side, according to the most approved mode of good husbandry, and so as to protect and preserve the young trees and wood from being destroyed or injured by cattle; and shall and will, from time to time, give unto the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their steward or bailiff, seven days' previous notice in writing of his or their intention to plash the said hedges, in order that the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their steward or bailiff, may attend and give directions concerning the same if he or they shall think proper;

And also shall and will, at all times and from time to time during the said term, foster and preserve the young trees, spires and thrifts, and the layers and quicksets of all kinds, standing, growing, or being in or upon the said premises or any part thereof, and, in case the same shall be destroyed or damaged, shall and will give notice thereof to the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their bailiff or steward, and by whom, to the best of his or their knowledge and belief, such destruction or damage was committed;

And shall and will keep the orchards belonging to the said premises well stocked with apple, pear, plum, and other fruit trees of the best and most profitable kind, and engraft with young wood such of the said trees as shall be decayed and out of prime, and also provide and plant flourishing young trees likely for growth, and of the value of — shillings each, at the least, in lieu of such as shall happen to die or be blown down during the said term, and properly fence in and secure the same from cattle;

And also preserve and keep up the stock of pigeons now in the dove-cot, or pigeon-house upon or belonging to the said farm and premises;

And further, that he the said J. N., his executors, administrators or assigns, shall not nor will, at any

time during the said term, hew, fell, cut down, lop, top, stub up, or destroy, or cause or knowingly permit or suffer to be hewed, felled, cut down, lopped, topped, stubbed up, or destroyed, without the consent in writing of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their steward or bailiff, any of the timber, timber-like, or other trees hereinbefore excepted out of this demise, (other than such as shall have been duly assigned and appointed to him or them for repairs,) nor plash, or cut down any alders, willows, sallows, pollards, hazels, thorns, bushes, springs, quick-sets, wood or underwood, which are now growing or being on the premises (save only and except for necessary repairs and fences, as hereinafter mentioned); And that in case any of the said excepted trees or woods shall be so hewed, felled, cut down, lopped, stopped, stubbed up, or destroyed as aforesaid, then and in such case the said J. N., his executors, administrators or assigns, shall and will pay unto the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] for his or their use, the sum of £ — for every load of timber or wood, and — shillings for every young tree of the age of — years or upwards, which shall be so hewed, felled, cut down, lopped, topped, stubbed up, or destroyed as aforesaid, and so proportionably for any greater or less quantity or number.

And that he or they shall not nor will cut or plash the hedges of or belonging to the said premises, until the same respectively shall be of full — years growth at the least, and then only at such proper and seasonable times in the year as hereinafter is mentioned;

And also that he the said J. N., his executors, administrators and assigns, shall and will, at all times and from time to time during the term hereby demised, use, treat, and manage all and every the lands, fields and grounds hereby demised, in a proper, careful, and husbandlike manner, in all respects whatsoever, and in particular shall not nor will take more than two successive crops of corn, grain or pulse off or from any of the

arable lands hereby demised, without summer tilling, and sowing turnips thereon, and feeding or consuming the same with sheep and neat cattle upon the lands producing such turnips, nor shall nor will set, sow, or make more than — crops of corn, grain or pulse, without laying the land down in a husbandlike manner, with sound grass or clover seeds, and continuing the same so laid down, for one complete year at the least, to be reckoned from the time of taking off such crops, to the Michaelmas then next following, and which said crops of corn or grain shall be taken in successive years, and one thereof (being the first or second, but not the last of the said crops) be of wheat, and the other two of barley, oats or pulse, and with the third or last of the said crops of corn or grain shall be sown and brushed or harrowed in, in the usual and best manner; at least 12 lbs. of good new clover; and one peck of the best new eaver or trefoil seed, upon each acre, and so in proportion for any less quantity than an acre;

And shall not nor will, during this demise, mow or cut for hay any of the neutral grass growing on or arising from the said premises oftener than once in each year, nor any clover or other artificial grass of the second year's lying, except in the case of failure of the first year's crop;

And also shall not nor will, at any time or times during this demise, plough, break up, or convert into tillage, nor cause or suffer to be ploughed, broken up or converted into tillage, any part of the meadow or pasture land, or any land which has not been in tilth for — years last past, nor dig or break up for bricks, tiles, turfs, flags, or any purpose, the said arable lands, or any other part of the lands and premises hereby demised, except as hereinafter is mentioned;

And further, that he the said J. N., his executors, administrators or assigns, shall not nor will, at any time or times during this demise, alter any land marks or boundaries now on or belonging to the demised premises, or throw down any fences raised or to be raised thereon;

And moreover, that he the said J. N., his executors, administrators and assigns, shall and will, during the last — years of the term hereby demised, keep or cause to be kept one or more field book or field books, according to a plan or form to be delivered to him by the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] in order to show, and in which such entries shall be made as to show, in what manner the several fields or closes of arable lands hereby demised have been respectively cropped, manured, and cultivated in each year of the said last — years of the said term, and shall and will, at all seasonable times in the day-time, on having one day's previous notice or information thereof, permit and suffer him the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] or any person or persons who shall or may be delegated, appointed or authorized by him or them for that purpose, to inspect or take a copy of the same or any part thereof, and also at any time or times during the said last-mentioned period, to enter into and upon the said fields and lands, and examine the state and condition thereof.

And it is further declared and agreed, that the said J. N., his executors, administrators and assigns, shall and will, in the last year of this demise, lay all the crops of corn, grain or pulse, to grow or arise from the said demised premises in such year, in the barns and stack or rick yards belonging thereto, and in the winter next after the end of the said term thresh out the same upon the said premises, and leave the straw, chaff, and fodder accruing therefrom in good condition, on the premises, for the benefit of the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] without any allowance for the same;

And also, that the said J. N., his executors and administrators, shall and will, at the end of the said term, leave upon some convenient part of the premises, to and for the use and benefit of the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] one full moiety or half part of the

hay, which shall arise from the said demised premises, in the last year of the said term, he and they allowing or paying to the said J. N., his executors, administrators or assigns, such a sum of money as the same shall be adjudged to be worth, by two indifferent persons, (one to be chosen by the said J. S., his heirs or assigns, [or his executors, administrators, or assigns,] or his or their steward or bailiff, and the other by the said J. N., his executors, administrators or assigns, and an umpire or third person to be by the valuers named in case of difference between them,) which sum so to be adjudged the said J. N., his executors and administrators, shall and will accept for the full value thereof;

And also shall and will, before the — day of —, in the last year of the said term, carry out and lay on a heap upon the headlands of such of the said demised premises, to be sown with corn in the winter next after the end of the said term, all such part of the muck, dung and compost, which shall be made or produced on the premises within the last year of the said term, as the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their steward or bailiff shall direct;

And also shall and will leave all the remainder of the said last year's muck, dung and compost in the yard belonging to the said messuage and premises, turned up in heaps, in a proper and husbandlike manner, for the use and benefit of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] without any allowance being made for the same;

And also shall and will, at the end of the said term, leave the dove-house or pigeon-cot, upon or belonging to the said premises, well stocked with pigeons.

And, moreover, that it shall and may be lawful to and for the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] or his or their steward or bailiff, as often as he or they shall think proper, in case any person or persons shall, at any time or times during this demise, hawk, hunt, course, fish, fowl, or otherwise sport

in, over, or upon the said demised premises or any part thereof, from time to time bring any action or actions, suit or suits, or otherwise prosecute and proceed against all and every such person and persons, in the name or names of the said J. N., his executors, administrators or assigns, and he the said J. N., his executors, administrators or assigns, shall not nor will, at any time, release or otherwise discharge such action or actions, suit or suits, or other proceedings, without the consent in writing of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their steward or bailiff;

And further, that he the said J. N., his executors, administrators and assigns, shall and will, at all times from time to time during the said term, warn off from the said demised premises, by notice in writing, under his or their hand or hands, all and every person and persons who shall at any time trespass, or come or be, upon the same premises or any part thereof, for the purpose of hawking, hunting, coursing, fishing, fowling, or otherwise sporting thereupon without the consent in writing of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their steward or bailiff, or some or one of them, and do or cause to be done, and concur in and assent unto, all and every such lawful and reasonable acts, matters and things whatsoever, which shall be considered by the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] to be requisite or expedient for preventing the destruction of, and otherwise preserving, the game, fish and fowl of every kind, which shall or may at any time, and from time to time during the said term, be upon the said premises or any part thereof or thereto adjoining:

Provided always, and it is hereby declared and agreed, that the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] or his or their lessees or lessee, shall be at liberty at any time within the last summer season next before the end of the said term hereby demised, to sow such of the said demised premises with turnips as shall be fit and proper to re-

ceive and grow the same, with like liberty to hoe and weed the same at pleasure, and free ingress, egress, and regress, with horses, carts, servants and others, for that purpose, and that the said J. N., his executors, administrators and assigns, shall not suffer any sheep or cattle to depasture thereon, or the same to be otherwise destroyed or damaged;

And also, that it shall be lawful for the said J. S., his heirs and assigns, [or executors, administrators and assigns,] in the last year of the said term, to sow all such clover or other grass seeds as he or they shall think proper, with the summer corn to be sown by the said J. N., his executors, administrators or assigns, and also that the said J. N., his executors, administrators and assigns, shall and will, in a husbandlike manner, harrow in such last-mentioned seeds, without any allowance for the same, and shall and will give at least one month's notice in writing, under his hand, to the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their steward or bailiff, of the time of sowing such summer corn.

Provided always, and it is hereby declared and agreed, that it shall be lawful for the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their surveyor, properly authorized, or his or their steward or bailiff, either alone or with workmen and others, twice in every year during the said term (or oftener if he or they shall see occasion), at seasonable times in the day-time [on giving three days' previous notice thereof to the said J. N., his executors, administrators or assigns,] to enter into and upon the messuages, farms, lands, buildings and premises hereby demised, or any part thereof, for the purpose of viewing and examining the repairs and other the state, condition, cultivation, and husbandlike state thereof;

And also, at any time or times within the last — years of the said term, in like manner to enter into and upon the said premises or any part thereof, in order to take a schedule or inventory of the fixtures then being thereupon;

And that in case any defects or

want of reparation of the said premises or any part thereof, or any removal of fixtures, or any default or mismanagement in the husbandry of the said lands or grounds, shall be there found or appear, he the said J. N., his executors, administrators and assigns, shall and will, upon notice thereof in writing being given to him and them, cause all such defects and defaults to be forthwith amended, corrected, and remedied in all things, and the said fixtures to be forthwith reinstated and replaced.

And further, that it shall be lawful for the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their stewards or bailiffs, or his or their servants or agents, at any time or times within the last three months next preceding the expiration or other determination of the said term of — years hereby demised, to affix or set up a printed or other notice upon any conspicuous part of the said demised premises, (not being upon any window or the house-door thereof,) that the said premises will be to be let at the expiration of the said term. And also at any time or times thereafter at all seasonable times in the day-time (giving at all times one day's previous notice thereof) to enter into and upon the said demised messuage or dwelling-house, lands and premises, or any part thereof, to show the same to any person or persons who shall express a desire to become a tenant or tenants thereof, or to view or see the same.

And also that he the said J. N., his executors, administrators or assigns, shall have the use of the barns and stack or rick yards upon or belonging to the said premises, until the — day of — next, after the end of the said demise, for the better threshing, dressing, and taking the last year's crop, and also have and retain the use of the stable for horses, and a lodging for a servant over the same, during such time as last aforesaid;

And also that, notwithstanding anything hereinbefore contained to the contrary, it shall be lawful for the said J. N., his executors, administrators and assigns, at all times during this demise, to dig and take

any quantity of clay or marle out of and from any part or parts of the said premises, as he or they shall judge proper, for the improvement of the lands hereby demised, and also all such quantities of gravel as shall be necessary to keep the roads in and upon the said premises in good repair and condition, but not for sale, nor to carry any part of such clay, marle, or gravel off the said premises;

And also for him and them, at all times during the said term, to have and take the underwood growing upon the said premises (except as hereinbefore expressed), and also all lops of pollard trees and trimmings of timber trees which have been hithertofore usually lopped or trimmed, and the plashings of the quick hedges belonging to the said premises, for or by way of estovers, or seasonable and sufficient house-bote, plough-bote, cart-bote, and hedge-bote, so that the same loppings and plashings should be of — years' growth at the least, and be taken in a husbandlike manner, and at seasonable times in the year, without any let or interruption of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or any other person or persons whomsoever lawfully or rightfully claiming by, from or under him, them or any of them.

And also, that he the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their steward or bailiff, shall and will, when and as often as he or they shall be reasonably requested by the said J. N., his executors, administrators or assigns, assign and set out to and for the said J. N., his executors, administrators or assigns, a proper and sufficient number of trees and quantity of timber, as shall from time to time be requisite for the repairs of the floors, doors, gates, stiles and posts, of, upon or belonging to the said premises; and in case the said premises shall be destroyed or damaged by storm, winds or tempests, (other than by lightning,) he the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] shall and will forthwith, and with all due and proper speed, at his and their own expense, rebuild, repair and rein-

state, or cause to be rebuilt, repaired and reinstated, the same, as the case may require.

Provided always, and these presents are upon this express condition, nevertheless, that if the said yearly rent or sum of £— hereinafter reserved, or the said further or additional sums hereinafter reserved or made payable, or any or either of them, or any part thereof respectively, shall be in arrear and unpaid by the space of — days next after any of the days or times hereinafter appointed for the payment thereof; or if the said J. N., his executors, administrators or assigns, shall, without the consent in writing of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] let, assign, set over, or otherwise part with, or cause or procure or permit or suffer to be let, assigned, set over or otherwise parted with, the same premises or any part thereof, or his or their estate or interest therein; or shall commit any act of bankruptcy under any of the statutes now in force relative to bankrupts, and shall be thereupon adjudged a bankrupt, or shall become insolvent or make a compromise with his creditors for less than twenty shillings in the pound; or shall suffer the said lease to be taken in execution; or shall commit or knowingly permit or suffer any spoil or waste in or upon the said premises or any part thereof, to the value of £— in any one year of the said term, without well and effectually amending, repairing or making sufficient satisfaction for the same, within the space of — calendar months next after notice in writing shall have been given to him or them for that purpose under the hand of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or willingly or knowingly do, permit or suffer, or cause or procure to be made, done, committed or suffered any act, deed or default, or matter or thing whatsoever, whereby or by reason or means whereof the said premises or any part thereof, shall or may be transferred unto or come into the occupation, hands or possession of any person or persons whomsoever, contrary to the true intent and

meaning of these presents; or shall neglect or fail to insure the said premises against loss by fire, or neglect or fail to perform and observe, or be guilty of any breach, non-performance or non-observance of any other the covenants, clauses, provisoes and agreements by him or them to be observed and kept, according to the true intent and meaning of the same respectively; or if the said J. N. shall depart this life during the said term; —then, and from thenceforth, in any or either of the said cases, this present demise or lease, and the covenant for quiet enjoyment hereinafter contained, shall wholly cease and be void, and the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] shall or lawfully may, at any time thereafter, enter into and upon the said demised premises or any part thereof, in the name of the whole, and repossess, retain, and enjoy the same as of his and their former estate, and as if this present demise or lease had not been made, but which entry, if made, it is hereby agreed shall not defeat, impeach, or prejudice any right of action or other remedy which the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] might by law have had for arrears of rent, penal sums or breach of covenant, on the part of the said J. N., his executors, administrators or assigns, to be paid or performed in relation to the said premises or any part thereof, if no such entry had been made, any thing hereinafter contained, or any rule of law to the contrary thereof, in anywise notwithstanding.

And the said J. S., for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree with and to the said J. N., his executors, administrators and assigns, in the manner following, that is to say, that he the said J. N., his executors, administrators and assigns, paying the yearly rent hereby reserved, at and upon the days and times and in the manner hereinafter appointed for payment thereof, and observing the several covenants and agreements hereinafter contained, by him and them to be performed and kept, shall and lawfully may peaceably and quietly

have, hold, occupy and enjoy the messuage or dwelling-house, farm, lands and premises hereby demised, for the term or time hereby granted thereof, without any hindrance, disturbance, interruption, claim or demand whatsoever, from or by him the said J. S., or any person or persons claiming by, from or under him, them or any of them.

Provided always, and it is hereby lastly agreed and declared, that all payments, which shall or may be made by the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] for or on the part of the said J. N., his executors,

administrators or assigns, for repairing or insuring the premises hereby demised, or other matter or thing, which by him or them is or ought to be made or done in relation thereto, and all penal and other sums hereby made payable by him the said J. N., his executors, administrators or assigns, in respect of the same, shall be deemed and considered in the nature of a rent or rents, and be recoverable by distress or otherwise, in like manner as the yearly rent or sum of £— hereinbefore reserved.

In witness, &c.

SECTION II.

Demise by Parol.

We have seen (a) that no lease in writing of any freehold, copyhold or leasehold land, made on or after the 1st January, 1845, shall be valid, unless the same shall be made by deed. But at common law it was not necessary that a demise of land or of any corporeal hereditament should be in writing; a parol demise was sufficient. By stat. 29 C. 2, c. 3, s. 1, however, it was enacted, that "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made and created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding." "Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parts at least of the full improved value of the thing demised" (b).

The effect of these two sections is, that a parol demise of corporeal hereditaments, for three years or less, whereon two-thirds at least of the full improved value shall be reserved as rent, is still a good and valid demise, as at common law (c); and there is no objection to its being as special in its terms, as

(a) *Ante*, p. 2.

(b) 29 C. 2, c. 3, s. 2.

(c) *Edge v. Stafford*, 1 Cr. & J. 301.

a demise in writing (b). But a parol demise for a longer term than three years, or on terms not warranted by the second section of the statute, is void as a lease for that term (c), and operates merely as a demise from year to year (d). But although in this latter case the actual demise is void by the statute, yet if the lessee enter, and occupy as tenant from year to year, he will be deemed to hold on the terms of the demise in all other respects, as far as such terms are consistent with a tenancy from year to year; for instance, he will be bound to keep the premises in tenantable repair, if by the terms of the demise he was bound to do so (e).

As to incorporeal hereditaments, a parol demise of them is, and always was, altogether void.

SECTION III.

Agreement.

What.] We have seen (f), that to constitute a lease, the operative words used must be words of present demise; and even then, the instrument may not be deemed a lease, if it appear clearly upon the face of it to have been the intention of the parties that it should not operate as such (g). And if it be not a lease, it operates merely as an agreement for a lease.

Also, by stat. 8 & 9 Vict. c. 106, s. 3, a lease, required by law to be in writing, of any tenements or hereditaments, and made after the 1st October, 1845, shall be "void at law," unless it be by deed (h). That is to say, it shall be void as a lease; but it does not appear to have been the intention of the legislature thereby to prevent its operating as an agreement for a lease (i).

Therefore all written instruments, not under seal, purporting to demise corporeal hereditaments, and using words of present demise for that purpose (k), if made on or before the 1st October, 1845, are leases: all made after that day, are seemingly agreements.

And all such instruments, not using words of present demise, are but agreements for leases, and not leases, whether they be under seal or not, and whether they be made before or

(b) *Ld. Bolton v. Tomlin*, 5 Ad. & El. 856.

(c) *Crosby v. Wadsworth*, 6 East, 602.

(d) *Clayton v. Blakey*, 8 T. R. 3. *Doe v. Bell*, 5 T. R. 471.

(e) *Richardson et al. v. Gifford*, 1 Ad. & El. 52; and see *Beale et al. v. Saunders et al.*, 3 Bing. N. C. 850.

(f) *Ante*, p. 23.

(g) See *Doe v. Morgan et al.*, 14 Law J. 5, cp. *Doe v. Clark*, 1d. 233, qb.

(h) See *ante*, p. 2.

(i) See *Burton v. Revell*, 16 Law J. 85, ex. *Arden v. Sullivan*, 19 Law J. 268, qb.

(k) See *ante*, p. 23.

after the time above mentioned. The reader will find a number of instances of such agreements mentioned *ante*, pp. 23, 24, 25.

Its effect.] The distinction between a lease and an agreement, in effect, is very material, and should be carefully kept in view. By a lease, immediately upon its execution, the lessee acquires an *interesse termini*; and upon his entry into the demised premises, the term is fully vested in him. By an agreement, he acquires no legal interest in the term, or in the land demised, nor can he set it up as a defence to an ejectment against him; it operates however, in most cases, as a licence to enter upon the premises agreed to be demised, and in all cases, if the intended landlord afterwards refuse to grant the lease, it gives the intended tenant a right to file a bill in equity, to enforce a specific performance of the agreement, or to maintain an action of assumpsit for damages, if any damage have been sustained (*l*). But after the tenant has entered upon the premises, and paid rent, he then becomes tenant from year to year (*m*), if there be nothing in the agreement to the contrary (*n*). Even where no rent was mentioned in the agreement, but the tenant was let into possession, and he paid a certain rent for two years, it was holden that this created a tenancy from year to year (*o*). So, where the tenant was admitted into possession, under an agreement at a certain rent, and no rent was in fact paid, but in an account stated between the landlord and him, he was charged with half-a-year's rent, and although he disputed the amount at first, yet he afterwards admitted it to be correct, and owing from him: this was holden to be equivalent to a payment of rent, in creating a tenancy from year to year, and that the landlord might distrain for it (*p*). But if there be no payment of rent (*q*), and no such implied admission of a tenancy, as is above mentioned, or other circumstances from which a tenancy can be implied, no such tenancy can be deemed to be created by the mere occupation of the party, nor can he be treated as tenant from year to year. So, where a party was let into possession, and a written agreement was made out and read to him, and he was to find a surety, and sign the agreement on a future day, neither of which he did: it was holden that this did not create any tenancy (*r*). So, if a man get into a house, without the

(*l*) See *Price v. Williams*, 1 Mee. & W. 6.

(*m*) *Doe v. Smith*, 1 Man. & Ry. 137. *Ld. Bolton v. Tomlin*, 5 Ad. & El. 856; see *Denn v. Cartwright*, 4 East, 29.

(*n*) *Atherstone v. Hestock*, 2 Man. & Gr. 511; and see *Doe d. Anglesey v. Roe*, 3 D. & R. 505.

(*o*) *Knight v. Bennett*, 3 Bing. 361.

(*p*) *Cox v. Bent et al.*, 5 Bing. 185.

(*q*) *Doe v. Pullen*, 2 Bing. N. C. 749.

(*r*) *Doe v. Cartwright*, 3 B. & A. 328.

privity of the landlord, and they afterwards enter into a negotiation for a lease, but differ about the terms: this does not create any tenancy from year to year (*s*).

After a tenancy from year to year is thus created, the tenant will be deemed to hold in other respects according to the terms and stipulations of the agreement (*t*); he may forfeit his term by a non-compliance with them, if there be a clause in the agreement to that effect (*u*); and the landlord may distrain for any arrears of rent (*v*). Neither of them, however, can put an end to that tenancy, without a regular notice to quit, or by executing the lease which is the subject of the agreement.

Stamp.] If the agreement be not under seal, it requires merely the ordinary agreement stamp, of 2s. 6d. (*w*).

But if the agreement be under seal, it requires a stamp of 1l. 15s., as a deed "not otherwise charged" in sch. 1 to stat. 55 G. 3, c. 184, tit. "Deed" (*x*).

Form of it.] There is no particular form required for an agreement for a lease. Any memorandum for a contract, signed by the parties, by which one agrees to let, and the other to take, the premises intended to be demised, describing them shortly, and stating the rent and term, and from what time the latter shall commence, will be sufficient. It is advisable, however, to insert in it, fully and explicitly, not only the terms generally of the holding, but all the covenants which are to be contained in the intended lease, that there may be no misunderstanding or dispute about them afterwards. If the agreement contain no stipulation on the subject of covenants, the tenant may object to any lease afterwards tendered to him, which contains any other than usual covenants (*y*). As to what shall be deemed usual covenants, *see ante*, p. 41. If the agreement be for an underlease, the tenant also in prudence should inform himself of the covenants contained in the head lease (*z*).

The following are forms of agreements for leases:—

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|---|---|
| (<i>s</i>) <i>Doe v. Quigley</i> , 2 Camp. 505. | (<i>w</i>) 7 & 8 Vict. c. 21, ss. 1, 2, |
| (<i>t</i>) <i>Ld. Bolton v. Tomlin</i> , 5 Ad. | and sch. |
| & El. 856. | (<i>x</i>) <i>Clayton v. Burtenshaw</i> , 5 |
| (<i>u</i>) <i>Doe v. Amey</i> , 12 Ad. & El. | B. & C. 41; and <i>see ante</i> , p. 43. |
| 476. | (<i>y</i>) <i>Propert v. Parker</i> , 3 Mylne |
| (<i>v</i>) <i>Mann v. Lovejoy</i> , Ry. & M. | & K. 280. |
| 355. | (<i>z</i>) <i>See Cosser v. Collinge</i> , 3 |
| | Mylne & K. 283. |

Agreement for a Lease of a Dwelling-house.

Articles of Agreement entered into
this — day of —, A. D. —,
Between J. S., of —, of the
one part, and J. N., of —, of
the other.

The said J. S., in consideration of the rents, covenants, and agreements hereinafter mentioned, on the part of the said J. N., his executors, administrators and assigns, to be paid, performed and observed, doth hereby contract and agree with the said J. N., his executors, administrators and assigns, that he the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] shall and will, on or before the — day of — now next ensuing, upon request made to him or them in writing under the hand of the said J. N., his executors, administrators or assigns for that purpose, grant and execute unto the said J. N., his executors, administrators and assigns, a good and effectual demise or lease, to be prepared by the counsel or solicitor of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] of all that messuage or tenement [&c.], together with all and singular the fixtures (not belonging to the outgoing tenant thereof), now being in or upon the said messuage or premises: To hold the same unto the said J. N., his executors, administrators and assigns, for the term of — years, to be computed from the — day of —, at the yearly rent of £—, clear of all taxes, deductions and abatements whatsoever (except the land-tax, landlord's property tax and sewers-rate), to be payable quarterly on the — day of —, the — day of —, the — day of —, and the — day of —, in each year.

And the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] shall and will, within — from the date hereof, furnish a correct abstract of his or their title to the said premises, to the solicitor or counsel of the said J. N., who shall be at liberty to inspect the deeds and evidences therein abstracted or referred to, for the purpose of ascertaining the

power of the said J. S. to grant the said intended lease.

And it is hereby declared and agreed, that there shall be contained in the said lease, and in the counterpart thereof, by and on the part of the said J. N., his executors, administrators and assigns, a covenant for payment of the said yearly rent in the manner and at the times aforesaid, and all taxes, assessments and other deductions (except as aforesaid), during the said term [unless for such part of the said premises as shall be untenable by reason of fire, storm or tempest, in which case a reasonable reduction or abatement shall be made as hereinafter is mentioned];

And also a covenant to keep the said messuage or tenement with the appurtenances in substantial and tenantable repair, in all things, during the said term [damage by fire, storm or tempest only excepted];

And also to paint, paper, and whitewash the said premises, in the last year of the said term, and also to bear a proportionable part of the expense of repairing party-walls, and of repairing and cleansing the common sewers and watercourses belonging to the said premises, in common with others; with liberty for the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] or his or their surveyor, at any time and from time to time during the said term, to enter upon the premises at all seasonable times (giving — days' previous notice thereof), to examine into the state of the repairs thereof;

And also at any time within the last six months of the said term, on like notice being given, to take an inventory of the fixtures;

And also to affix upon some conspicuous part of the premises, notice of the premises being to be let, at the expiration of the said term, and to show them to all persons desiring to see the same.

And also that the said J. N. shall not assign over, underlet or otherwise part with the said premises or

any part thereof, or his interest therein, without the consent in writing of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] with a proviso nevertheless that such consent shall not be unreasonably withheld, nor any sum of money or other premium be required for granting the same;

Nor without the like consent carry on or suffer to be carried on, upon any part of the said premises, the trade or business of an ale-house-keeper, butcher, baker, tallow-chandler, soap-maker, working-smith, or any other noxious, offensive or noisy trade or business whatsoever;

Nor permit any sale by public auction to be at any time had upon the premises.

And also a proviso empowering the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] to re-enter upon the said premises, on non-payment of the said yearly rent by the space of — days next after the same shall become due, or on the bankruptcy or insolvency of the said J. N., or on non-performance of any of the covenants to be contained in the said lease on the tenant's part to be performed.

And also, all such other reasonable covenants, clauses, and agreements by and on the part of the said J. N., his executors, administrators and assigns, as are usual and proper in leases of a like nature: and in case of dispute or difference of opinion between the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] and the said J. N., his executors, administrators or assigns, in respect thereof, the same shall be referred to three arbitrators to be named, as is usual in other cases of submission to arbitration.

And the said J. N. doth hereby, for himself, his executors, administrators and assigns, promise and agree to accept of the said lease, and to execute a counterpart of the same.

And it is hereby further declared and agreed, that the said lease shall contain on the part of the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] if required by the

said J. N., his executors, administrators or assigns, a covenant or declaration that he the said J. S. hath full and sufficient power and authority to grant the said lease on the terms and conditions therein contained;

And also a proviso for the suspension or reasonable abatement of the rent thereby to be reserved during so much of the said term of — years, as the said premises or any material part thereof shall remain uninhabitable or useless, by reason of fire, storm or tempest; with a provision for referring the same to arbitration, in case of any dispute in respect of the time or proportion of such suspension or abatement.

And also a covenant by and on the part of the said J. S., his heirs and assigns, [or his executors, administrators or assigns,] to rebuild or repair, in a substantial manner, and with all proper expedition, such parts of the said premises as shall be consumed or damaged by fire, storm or tempest;

And also that the said J. N., his executors, administrators and assigns, duly paying the yearly rent, and performing and observing the covenants and agreements in the said lease, to be reserved and kept respectively, shall hold and enjoy the said premises during the said term, free from disturbance by the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or any person claiming under or in trust for him the said J. S. [or any of his ancestors].

And moreover a covenant on the part of the said J. S., his [heirs], executors, administrators, and assigns, that he and they will, at the request and expense in all things of the said J. N., his executors, administrators or assigns, execute any such further assurance to him and them, as shall be deemed requisite for securing such quiet enjoyment as aforesaid.

And it is also further agreed by and between the parties hereto, that there shall be contained in the lease, so to be granted as aforesaid, a proviso empowering either of them the said parties, their respective heirs, executors, administrators or assigns, to determine the said lease at the end of the first

seven or fourteen years of the said term of — years, on giving six months' notice thereof.

And it is further agreed and declared that the destruction of the said premises by fire, or other cause, shall not vacate the present contract, but that the same shall remain in force as if no such accident had happened. And it is hereby lastly agreed and declared, that the expense of these presents,

and of such lease and counterpart as aforesaid, including a reasonable fee to the counsel of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] to prepare or settle the said lease, shall be borne and paid by the said J. N., his executors, administrators or assigns [or equally by and between the said parties hereto].

In witness, &c.

Agreement for a Lease of a Farm.

Articles of Agreement entered into this — day of —, A. D. —, Between J. S., of —, of the one part, and J. N., of —, of the other part.

The said J. S. in consideration of the rents, covenants and agreements hereinafter mentioned, on the part of the said J. N., his executors, administrators and assigns, to be paid, performed and observed, doth hereby contract and agree with the said J. N., his executors, administrators and assigns, that he the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] shall and will, on or before the — day of — now next ensuing, upon request made to him or them in writing under the hand of the said J. N., his executors, administrators or assigns, for that purpose, grant and execute unto the said J. N., his executors, administrators and assigns, a good and effectual demise or lease, to be prepared or approved by the counsel of the said J. S., or of his heirs or assigns, [or his executors, administrators or assigns,] of all that messuage or tenement and dwelling-house, situate [&c.], and also all those pieces or parcels of arable, meadow, and pasture lands thereto belonging, that is to say, All that [&c.], called or known by the name of — farm, as the same are now or late were in the occupation of —, except timber and other trees, [&c. &c.]; To hold the same unto the said J. N., his executors, administrators and assigns, for the term of — years, to be computed from the — day of —, at the yearly rent of £—, clear of all taxes, deductions and abatements whatso-

ever (except the land-tax, landlord's property tax and sewers-rate), to be paid quarterly, at Lady-day, Midsummer, Michaelmas, and Christmas, in each year, with an additional rent of — per acre, for converting arable into pasture, or pasture into arable land.

And it is hereby declared and agreed, that there shall be contained in the said lease, and in the counterpart thereof, by and on the part of the said J. N., his executors, administrators and assigns, a covenant for payment of the said yearly rent in the manner aforesaid, and all taxes, assessments and other deductions, except as aforesaid, during the said term, [save only during such time as the said premises shall be untenable by reason of fire, storm or tempest, in which case a proportionate abatement is to be made by reason thereof].

And also a covenant to keep the said messuage, barns, buildings, and premises, with the appurtenances, in substantial and tenantable repair in all things during the said term, [damage by fire, storm or tempest only excepted,] the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] finding rough timber for that purpose;

And also to insure the same against loss by fire in the sum of £—,

With liberty for the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their surveyor, alone or with others, to enter upon the premises at all reasonable times (giving three days' notice thereof)

to examine into the state of the repairs thereof;

And also, at any time in the last six months of the said term, upon like notice, to take an inventory of fixtures;

And also to affix upon some conspicuous part of the premises, notice of the premises being to be let at the expiration of the said term, and to show them to all persons desiring to see the same;

And further, that the said J. N. shall not assign over, underlet, or otherwise part with the said premises, or any part thereof, or his interest therein, without the consent in writing of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] with a proviso nevertheless that such consent shall not be unreasonably withheld, nor any sum of money or other premium required for granting the same;

And in the said lease shall also be contained all usual and other proper covenants on the part of the said J. N., his executors, administrators and assigns, for using and managing the said demised land, ground and premises, in a husband-like manner in all respects, and in particular, covenants to cut down and destroy all noxious weeds growing thereon; to lay open and spread the ant-hills and mole-hills; drain the wet and springy parts of the lands; tether and fold upon the said premises the sheep and other cattle which shall be kept thereon; spend and use upon the premises and convert into dung or compost with neat beast or other cattle, the hay, straw, chaff, fodder, and estover, which shall be produced therefrom, and spread and bestow the same upon the lands requiring the same; prune and make new the quick and other hedges, and protect the same and the young trees from cattle and other injury, and keep the orchards well stocked with fruit trees of the best kind;

And also covenant that the said J. N., his executors, administrators or assigns, shall not cut down or destroy any timber or timber-like trees (except for necessary repairs);

Nor cut or plash the quick hedges, under — years' growth;

Nor grow more than two successive crops of corn, grain, or pulse,

on the arable land, without a summer tilling, and sowing turnips thereon, and feeding off the same, the first or second of the said crops to be wheat, and the other two, barley, oats or pulse, and the last of the said crops to be mixed with clover and trefoil seed;

Nor take more than — crops off the said lands, without laying down the same with clover or other grass for the space of one year;

Nor mow for hay any of the meadow or pasture grounds oftener than once in each year; nor the clover or other artificial grass sown on the arable land of the second year's lying;

Nor convert into tillage any of the meadow or pasture land.

And also covenants that the said J. N., his executors, administrators and assigns, will, in the last year of the said demise, lay all the corn in the barns, and thresh out the same in the ensuing winter, upon the said premises, and leave the straw and chaff for the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] without any allowance for the same, and spread and dispose of the dung and compost produced in the last year of the said term in such manner as the said J. S. may direct;

And at the end of the said term leave one-half of the hay of the last year's growth for the benefit of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] or his or their incoming tenant, on being allowed the value thereof;

And in which said lease shall also be contained a proviso or liberty for the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] to enter at all times upon the demised premises to fell timber, and to fish, hunt and sport on the said premises, and to prosecute depredators in the name of the said J. N., his executors, administrators or assigns;

And also, in the last summer of the said term, to sow any of the land with turnips; and in the last year of the said term to sow clover or other grass seeds with the corn sown by the said J. N., his executors, administrators or assigns, to be harrowed in by him and them;

And also, within the said last year

of the term, take inventories of fixtures; and fix up notice of the premises being to be let, as and when the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] shall think proper, and with free ingress, egress and regress for all or any of the said purposes.

And in the said indenture of lease shall be contained a proviso empowering the said J. S., his heirs or assigns, [or his executors, administrators or assigns,] to re-enter upon the said premises as of his former estate, in case the said rent shall be in arrear for — days; or the said J. N., his executors, administrators or assigns, shall, without such consent as aforesaid, assign or part with the said premises or any interest therein, or fail in observing any of the covenants or agreements therein contained, or shall become bankrupt or insolvent;

Together with all such other reasonable covenants, clauses and agreements by and on the part of the said J. N., his executors, administrators or assigns, as are usual or proper in leases of a like nature.

And the said J. N. doth hereby for himself, his executors, administrators or assigns, promise and agree to accept of the said lease, and to execute a counterpart of the same.

And it is hereby further declared and agreed, that the said lease shall contain, on the part of the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] a covenant that the said J. S. hath lawful and full authority to grant the said lease;

And also a proviso for the suspension or abatement of the reserved rent, during so much of the said term as any part of the said premises shall remain uninhabitable or useless, by reason of fire, storm or tempest; with reference to arbitration, in case of any dispute in respect of the time or proportion of such suspension or abatement;

And also a covenant or agreement, on the part of the said J. S., his heirs or assigns, [or his executors, administrators or assigns,]

to rebuild or repair such part of the said premises as shall be so consumed or damaged;

And also that the said J. N. may, at all times during the said demise, dig and take away marle and clay for the improvement of the lands demised, and also sufficient gravel to keep the roads in and upon the said premises in good repair;

And also that he, the said J. N., may plash the quick hedges and underwood growing upon the said premises, and the tops of pollard trees and trimmings of timber trees for reasonable estovers, viz., cart, fire, and hedge-bote;

And that the said J. S. shall provide or allow, upon the said premises or within three miles thereof, necessary rough timber on the stem, bricks, tiles and lime, for the repairs of the said premises, and the fences and gates belonging thereto, when and as often as the same shall be necessary;

And also to permit the said J. N., his executors, administrators and assigns, to have the use of the barns and rick-yards until the — day of — next after the end of the said term;

And the said lease shall also contain a covenant by and on the part of the said J. S., his heirs and assigns, [or his executors, administrators and assigns,] for quiet enjoyment by the said J. N., his executors, administrators and assigns, on his and their paying the rent, and performing and observing the covenants and agreements in the said lease to be contained respectively; and for further assurance in respect thereof if required.

And it is hereby further agreed and declared, that the destruction of any part of the said premises by fire or other accident between the date hereof and the said — day of —, shall not vacate or affect the present contract.

And it is hereby lastly agreed, that the said J. N., his executors, administrators or assigns, shall defray the expense of these presents, and of such lease or counterpart as aforesaid, including a reasonable fee to counsel to prepare or settle the said lease.

In witness, &c.

SECTION IV.

Implied Contracts.

Tenancy, when implied.] It has been already mentioned (*a*) that where there is merely an agreement for a lease, and the intended lessee is let into possession under it, and pays rent for it to the lessor, a tenancy from year to year is thereby impliedly created (*b*); unless there be something in the agreement, which shows the intention of the parties to have been clearly otherwise (*c*); or that the circumstances under which the payment was made (and which may be proved by either party) repel the implication (*d*). Even where the amount of the yearly rent was not mentioned in the agreement, but the tenant paid a rent certain for two years, it was holden that an implied tenancy from year to year was thereby created (*e*). So where, although the rent was specified in the agreement, yet none was actually paid; but the landlord charged the tenant with half-a-year's rent in an account he furnished to him, and the tenant, although at first he disputed the amount, yet afterwards admitted that half-a-year's rent was due, naming the amount, and the account was altered accordingly: this admission was holden to be equivalent to a payment of rent, in creating a tenancy from year to year (*f*). But where by the agreement the parties expressly state that the tenancy is to be at will, a tenancy from year to year cannot be presumed (*g*). Where no rent has been paid (*h*), nor any thing done which is equivalent to it, this tenancy cannot be implied. So where A. had let premises to B. at a certain rent, and B. being under a notice to quit at Michaelmas, A. agreed with C. to give him a lease of the premises at an increased rent for a term of years, to commence at Michaelmas, and agreed to put the premises in repair before that time; C. was let into possession, but A. did not repair the premises, nor was any lease executed: it was holden that C. was not to be considered as holding at the advanced rent, or as continuing at the rent previously paid by B., but was liable merely for such a reasonable rent as the premises were worth (*i*). So where there was a negotiation for a letting, and the agreement drawn and ap-

(*a*) *Ante*, p. 61.

(*b*) *Doe v. Smith*, 1 Man. & Ry. 137.

(*c*) *Atherstone v. Bostock*, 2 M. & Gr. 511. *Richardson v. Langridge*, 4 Taunt. 128; and see *Doe d. Anglesey v. Roe*, 2 D. & R. 565.

(*d*) *Doe v. Crago*, 17 Law J. 263, cp.

(*e*) *Knight v. Bennett*, 3 Bing. 361.

(*f*) *Cox v. Bent*, 5 Bing. 185.

(*g*) *Doe v. Cox*, 17 Law J. 3, qb.

(*h*) *Doe v. Pullen*, 2 Bing. N.C. 749. *Doe v. Wood*, 15 Law J. 41, ex.

(*i*) *Mayor, &c. of Thetford v. Tyler*, 15 Law J. 33, qb.

proved of by the tenant, but he was to find a person as surety, and he neither found the surety nor executed the agreement: it was holden that no implied tenancy from year to year was thereby created (*k*). So where a man got into possession of a house, without the privity of the landlord, and although they afterwards entered into a negotiation for a lease, yet they differed upon the terms, and no lease was in fact granted: it was holden that no tenancy from year to year was thereby created (*l*). Where a tenancy from year to year is thus impliedly created, the landlord may distrain for his rent (*m*), and it will be implied that the tenant holds the premises upon the terms stated in the agreement (*n*), as far as such terms are consistent with a tenancy from year to year.

So, where a tenant is in possession under a void lease, for a term, and pays rent, a tenancy from year to year is thereby impliedly created (*o*); but the tenant notwithstanding is deemed impliedly to hold under the terms of the lease (*p*), as far as such terms are consistent with a tenancy from year to year. So, where a lease granted by a tenant for life, is put an end to by his death, but the remainderman afterwards receives rent from the tenant, this impliedly creates a tenancy from year to year, and the remainderman cannot put an end to it without giving a notice to quit (*q*).

So where a tenant has occupied premises under a lease for a term which has expired, and he continues to hold over after the expiration of the lease,—if the landlord receive rent from him for the premises, for a time subsequent to the former term, a tenancy from year to year is thereby created between them (*r*); unless from circumstances it appear clearly that the intention of the parties was otherwise (*s*). So where a man rented and occupied glebe lands under a rector, and afterwards was allowed by his successor to hold the glebe for eight or nine months, this was holden such an acquiescence in the occupancy as created a tenancy from year to year, and that a person claiming under the new rector could not recover the premises in ejectment without first determining that tenancy

(*k*) *Doe v. Cartwright*, 3 B. & A. 326.

(*l*) *Doe v. Quigley*, 2 Camp. 505.

(*m*) *Cox v. Bent*, 5 Bing. 185. *Mann v. Lovejoy*, Ry. & M. 355.

(*n*) *Doe v. Amey*, 12 Ad. & El. 476. *Ld. Bolton v. Tomlin*, 5 Ad. & El. 856. *Colley v. Streeton*, 2 B. & C. 273; and see *Tempest v. Rawling*, 13 East, 18.

(*o*) *Clayton v. Blakey*, 8 T. R. 3. *Doe v. Bell*, 5 T. R. 471.

(*p*) *Richardson v. Gifford*, 3 Nev. & M. 325; 1 Ad. & El. 52. *Beale et*

al. v. Saunders et al., 3 Bing. N. C. 850. *Doe v. Bell*, 5 T. R. 471; and see *Sauvage v. Dupuis*, 3 Taunt. 410. *Arden v. Sullivan*, 19 Law J. 268, qb.

(*q*) *Doe v. Watts*, 7 T. R. 83.

(*r*) Per Ld. Kenyon, C. J., in *Doe v. Stennett*, 2 Esp. 718. *Doe v. Smarridge*, 14 Law J. 327, qb.; and see *Peirse v. Shaw*, 2 Man. & Ry. 418.

(*s*) See *Simkin v. Ashurst*, 1 Mers. & W. 261. *Freeman v. Levy*, Moody & M. 19.

by a notice to quit (*t*). But the tenant's merely holding under an agreement for a new term, if he had not paid rent, is not of itself a bar to an ejectment brought by the landlord recently after the end of the old term (*u*). Where a tenancy from year to year is thus created, the tenant will be presumed to hold at the old rent (*v*), unless there be some agreement to the contrary, and upon the terms of the expired lease in other respects (*w*), as far as such terms are applicable to a tenancy from year to year. Even where a man occupied a farm for a term, under a lease, one of the stipulations in which was that he should leave all the manure upon the farm at the end of his tenancy,—which was different from the custom of the country, according to which a tenant was entitled to be paid for the manure he left;—and after the expiration of the term the tenant continued to hold on, and pay rent for many years, and then quitted the farm, leaving the manure: the court held that he was not entitled to be paid for it, according to the custom of the country, for he was impliedly holding under the terms of the old lease, which made no provision for such payment (*x*).

But if a party be let into possession of premises under a contract for the sale of them, and the sale be not afterwards completed, this creates nothing more than a tenancy at will, or at sufferance, unless there be something in the contract of sale to the contrary (*y*). If the sale go off from default on the part of the vendor, it is a tenancy at will; and upon the will being determined by a demand of possession or otherwise (*z*), the intended vendor may recover the possession by ejectment (*a*), without giving any notice to quit (*b*), or if it go off through default of the vendee, it is merely a tenancy at sufferance, and neither notice to quit nor demand of possession is necessary, to enable the vendor to maintain ejectment (*c*). On the other hand, the vendee is not liable to an action for use and occupation for the time he has been in possession (*d*), except for such time as he may have continued to occupy, after the contract for sale had gone off (*e*).

(*t*) *Doe v. Somerville*, 6 B. & C. 126.

(*u*) *Doe v. Stennett*, 2 Esp. 717.

(*v*) *Harding v. Crethorn*, 1 Esp.

57. *Bishop v. Howard*, 2 B. & C. 100.

(*w*) *Digby v. Atkinson*, 4 Camp.

275. *Hutton v. Warren*, 1 Mees. & W. 466.

(*x*) *Roberts v. Barker*, 1 Cr. & M. 808.

(*y*) See *Saunders v. Musgrove*, 6 B. & C. 524.

(*z*) See *Ball v. Cullimore et al.*, 2 Cr. M. & R. 120.

(*a*) *Doe v. Jackson*, 1 B. & C.

448. *Right v. Beard*, 13 East, 210.

Doe v. Miller, 5 Car. & P. 595.

(*b*) *Doe v. Chamberlaine*, 5 Mees. & W. 14.

(*c*) *Doe v. Lawder*, 1 Stark. 308.

Doe v. Sayer, 3 Camp. 8. *Doe v. Boulton*, 6 M. & S. 150.

(*d*) *Rumball v. Wright*, 1 Car. & P. 589.

(*e*) *Howard v. Shaw*, 8 Mees. & W. 118.

Covenants, &c. implied on the part of the lessor.] A covenant for quiet enjoyment may be implied from the word "*demisi*" in a lease (*f*). But this is the only contract the law will imply upon the part of the landlord (*g*); for instance, in the case of a tenancy from year to year, no agreement can be implied that the landlord will do substantial repairs, in the absence of an express stipulation to that effect (*h*). In one case, indeed, it was holden that where a man lets a house, he impliedly undertakes that it is habitable, and free from any serious nuisance; and therefore where a tenant, upon entering into possession of a furnished house, found it so infested with bugs that it was impossible to dwell in it, and left it,—it was holden that he was liable to pay only for the time he actually occupied (*i*). But the authority of that case has since been very much shaken; and it has been holden that at all events, if the house be let upon lease, there is no such implied warranty (*k*). So, on the letting of land or aftermath, &c., there is no implied warranty that it is fit for the use for which the lessee requires it (*l*). Also by stat. 8 & 9 Vict. c. 10, s. 6, neither the word "give," nor the word "grant" in any deed, executed after the 1st October, 1845, shall imply any covenant in law, in respect of any tenements or hereditaments, except in cases where by any Act of Parliament it is or shall be declared that the word "give" or the word "grant" shall have such effect.

Covenants, &c. implied on the part of the lessee.] It has been already stated, that where a man occupies premises under an agreement, or under a void lease, or continues to hold over and pay rent, after a former lease has expired, the law implies that he holds under the terms and stipulations contained in such agreement or lease, as far as they are applicable to his present tenancy (*m*). Therefore, where a man was let into possession of a farm, and paid rent, under an agreement for a future lease of fourteen years, which was to contain a covenant (amongst others) against taking successive crops of corn from the land, and a proviso for re-entry for breach of any of the covenants; the lease was not in fact granted; but the tenant having taken successive crops of corn from the farm, and which would be a breach of the covenant if the lease had been executed, the lessor brought an ejectment: and it was holden that he had a right to recover; until the lease should be executed, the tenant

(*f*) *Spencer's Case*, 5 Co. 17.

(*g*) *Per Parke, B.*, 12 M. & W. 85; see *Messent v. Reynolds*, 15 Law J. 220, cp.

(*h*) *Gott et al. v. Gandy*, 23 Law J. 1, qb.

(*i*) *Smith v. Marrable*, 11 Mees. & W. 5.

(*k*) *Hart v. Windsor*, 12 Mees. & W. 68.

(*l*) *Sutton v. Temple*, 12 Mees. & W. 52.

(*m*) *Ante*, pp. 60, 70.

held as tenant from year to year, subject to the terms and conditions which by the agreement were to be embodied in the lease, and being guilty of a breach of one of them, the landlord had a right to re-enter (*n*). So, where a tenant occupied premises under a special agreement, which was to be the basis of a future lease, and the agreement contained a provision (among others) that he should keep the premises in tenantable repair: it was holden that the landlord might maintain assumpsit generally against the tenant for not keeping the premises in repair, without setting out the special agreement in the declaration (*o*). If a man take a house under an agreement, for a term of years, "at and under the rent of 80*l.*," the law implies a promise upon his part to pay that rent (*p*), unless there be circumstances in the case which repel the implication (*q*); and if by the agreement there be a power reserved to the landlord to re-enter, for a breach of "any of the agreements therein contained," it extends to the non-payment of this rent, and the landlord may recover the premises in ejectment, although there be no express agreement to pay the rent (*r*). If a farm be let to a tenant, without any stipulation how he is to manage it, the law implies a promise upon his part that he will cultivate and manage it in a good and husbandlike manner, and according to the custom of the country (*s*). So, a contract will be implied, that a tenant will use a house and fixtures in a tenantlike manner (*t*); that he will use a furnished house in a tenantlike manner, take care of the furniture, and leave it and the linen clean, &c. (*u*); and the like,—as far as such implied contracts are consistent with the terms of the express contract between the parties. But where a lease contains an express covenant upon any subject, as for instance to repair, no other contract to repair can be implied from the relation of landlord and tenant (*v*).

SECTION V.

Assignment.

An assignment is a transfer or making over to another, of a right one has in an estate. It differs from a lease in this, that

(*n*) *Doe v. Amey*, 12 Ad. & El. 476.

(*o*) *Colley v. Streeton*, 2 B. & C. 373. *Arden v. Sullivan*, 19 Law J. 268, qb.

(*p*) *Doe v. Kneller*, 4 C. & P. 3.

(*q*) *Mayor, &c. of Thetford v. Tyler*, 15 Law J. 33, qb., *ante*, p. 68.

(*r*) *Doe v. Kneller*, 4 Car. & P. 3.

(*s*) *Powley v. Walker*, 5 T. R. 373.

(*t*) *White v. Nicholson*, 4 M. & Gr. 95.

(*u*) *Stanley v. Agnew*, 12 Mees. & W. 827.

(*v*) *Standen v. Christmas et al.*, 16 Law J. 265, q8.

by a lease, the lessor grants an interest less than his own, reserving to himself a reversion; but by an assignment, he parts with the whole property (*a*). If a man convey the whole of his interest by deed, it is an assignment, not a lease, although by the deed he reserve rent to himself, and the deed contain covenants which were not in the original lease or conveyance to him (*b*). And the same, if by the deed he convey a greater interest than he himself possessed (*c*). On the other hand, if by the deed he conveyed a less estate than he had in the premises, it would be a lease not an assignment. Even where certain lessees for lives granted to J. S. by deed all their estate, right, title and interest, &c. in the demised premises, *habendum* to him and his executors for ninety-nine years, if the lives should so long continue, in as large, ample and beneficial a way as the grantors, their heirs, &c.: this was holden not to be an assignment of the freehold, and consequently not of the whole of the interest the grantors had in the lease, and was therefore nothing more than an underlease (*d*). There is a difference also in the effect of the two instruments. If the lessee assign his term, although by the deed he reserve rent to himself, he cannot distrain for it (*e*); but he may sue for it; and the action will lie, even although the assignee merely accepted and retained the deed of assignment, but never entered into possession (*f*). But if he make an underlease, he may either distrain or sue, at his option; and as to the original lessor, although he may, of course, distrain upon the demised premises, he cannot sue the under-lessee, for there is no privity between them (*g*).

The relation of landlord and tenant may be created, either by the lessor assigning his reversion to another, in which case the assignee immediately becomes the landlord of the lessee, or by the lessee assigning his term to another, in which case the assignee of the term becomes the tenant of the lessor,—or by both parties respectively assigning their interests to others, in which case the assignee of the reversion immediately becomes the landlord and the assignee of the term the tenant.

Assignee of the reversion.] If the lessor assign his reversion, the assignee may have an action of debt for rent (*h*), or covenant for a breach of any covenant running with the

(*a*) *Ante*, p. 2. 2 Bl. Com. 326, 327.

(*b*) *Palmer v. Edwards*, 1 Doug. 187, n. *Pluck v. Digges*, 4 Bligh, N. 8. 31.

(*c*) *Baker v. Gostling*, 4 Moore & S. 530.

(*d*) *Earl Derby v. Taylor*, 1 East, 502.

(*e*) *Proce v. Corrie*, 5 Bing. 24.

(*f*) *Baker v. Gostling*, 4 Moore & S. 530.

(*g*) *Hulford v. Hatch*, 1 Doug. 188.

(*h*) Y. B. 5 H. 7, 186, 10 a. Bro. Abr. Dette, 141. 1 Ro. Abr. 501. 3 Co. 22 b. 4 Mod. 81. 3 Mod. 338. Carth. 161. *Allen v. Bryan*, 5 B. & C. 512.

land (*i*), against the lessee; or if the lessee have assigned his term, the lessor or assignee of the reversion may in like manner have debt or covenant against the assignee of the term (*k*). And a devisee of a reversion, is an assignee, within the meaning of this rule (*l*). But the assignee or devisee of a reversion cannot maintain an action for breach of a covenant not running with the land, or which is merely collateral (*m*). On the other hand, also, the lessee may maintain an action of covenant against the assignee of the reversion, for the breach of any covenant running with the land (*n*). So may the assignee of the term (*o*). As to what covenants run with the land, and what do not, we shall have an opportunity of considering the subject in a subsequent part of this work.

Assignee of the term.] If the lessee assign his term, the assignee may have an action of covenant against the lessor or his assignee, for breach of any covenant running with the land (*p*). So the lessor or his assignee may have covenant against the lessee or the assignee of the term, at his election, upon a covenant running with the land, even although he have accepted the assignee of the term as his tenant (*q*); and he may bring the action against the assignee, even before he has taken possession (*r*). So he may have debt for rent against the lessee, if he have not accepted the assignee of the term as his tenant (*s*); but if he have accepted the assignee as his tenant, he cannot afterwards maintain debt for rent against the lessee, although he may bring covenant (*t*). No action however will lie by the lessor or his assignee, against the assignee of the term, for any breach of covenant happening before the assignment (*u*), or after such assignee shall have assigned the term over to another (*v*). And there is no fraud in an assignee

(*i*) 32 H. 8, c. 34. 1 Saund. 237.

Bro. Abr. Sum. & Sev. 6. Co. Lit.

384. a. *Twynam v. Pickard*, 2 B.

& A. 105. And see *Wootton et al.*

v. Steffenoni, 12 Mees. & W. 129.

(*k*) 3 Mod. 337, 338. 1 Show.

199. Carth. 182. 1 Salk. 80, 81.

(*l*) *Isherwood v. Oldknow*, 3 M.

& S. 382.

(*m*) *Thursby v. Plant*, 1 Saund.

237. *Webb v. Russell*, 3 T. R.

393.

(*n*) 1 Saund. 237.

(*o*) *Infra*.

(*p*) 32 H. 8, c. 34, s. 2. Cro. El.

373, 436. Moor, 419. *Spencer's*

case, 5 Co. 17 a. *Campbell v.*

Lewis, 3 B. & A. 392.

(*q*) Cro. Jac. 309, 521, 522. 5 H.

7, 19 a. 3 Co. 22 b. 24 b. Carth.

182. 1 Salk. 80, 81. 1 Saund.

240.

(*r*) *Walker v. Reeve*, 2 Doug.

461, n. *Baker v. Gostling*, 4

Moore & S. 539.

(*s*) *Wadham v. Marlow*, 4 Doug.

54. 1 H. Bl. 438, n.

(*t*) *Orgill v. Kemshead*, 4 Taunt.

642.

(*u*) *Walker v. Reeve*, 3 Doug.

19; 2 Doug. 461, n.

(*v*) Bul. N. P. 159. *Chancellor v.*

Poole, 2 Doug. 764. *Walker v.*

Reeve, Id. 461, n. 3 Doug. 19.

Paule v. Nurse, 8 B. & C. 486.

Taylor v. Shum, 1 Bos. & P. 21.

Barnfather v. Jordan, 2 Doug.

452. *Harley v. King*, 2 Cr. M. &

R. 18. *Wolveridge v. Steward*, 1

Cr. & M. 644. *Odell v. Wake*, 3

Camp. 394. *Hartshorne v. Watson*,

5 Bing. N. C. 477.

thus assigning the term over to another, even although done evidently for the purpose of getting rid of his liability, and although the party to whom he assigns it never enters into possession, or accepts the lease (*w*). So, for a covenant not running with the land, no action of covenant will lie against an assignee (*x*). And when an action is brought against a person as assignee, care must be taken to ascertain that he is one; for the lessor or his assignee cannot maintain covenant against an under-lessee, there being no privity of contract between them (*y*).

Form of the assignment.] By stat. 29 Car. 2, c. 3, s. 3, no leases, estates or interests, either of freehold or term of years [even a term for less than three years (*z*)], or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing,—or by act or operation of law (*a*).

And by stat. 8 & 9 Vict. c. 106, s. 3, an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, made after the 1st October 1845, shall be void at law, unless made by deed (*b*).

As to the stamp: An assignment of a reversion must be stamped with an ad valorem stamp, in the same manner as any other conveyance (*c*). So, an assignment of a term, for a valuable consideration, must be stamped as a conveyance (*d*). But in all other cases, an assignment is subject to a stamp of 1*l.* 15*s.* (*e*); or if, with any schedule, receipt or other matter put or endorsed thereon or annexed thereto, it shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,080, there must be paid a further progressive duty of 1*l.* 5*s.* 55 G. 3, c. 184, Sch. 1, tit. "Assignment or Assignment."

(*w*) *Taylor v. Shum*, supra.

(*x*) *Griscot v. Green*, 1 Salk. 190. *St. Saviour's v. Smith*, 1 W. Bl. 351; Bul. N. P. 150. *Grey v. Cuthbertson*, 4 Doug. 351.

(*y*) *Halford v. Hatch*, 1 Doug. 163.

(*z*) *Barrett v. Rolph et al.*, 14 Law J. 308, ex.

(*a*) See *Botting v. Martin*, 1

Camp. 319. *Preece v. Corrie*, 5 Bing. 24. *Paul et ux. v. Simpson*, 15 Law J. 382, qb.

(*b*) *Ante*, p. 2.

(*c*) See 55 G. 3, c. 184, Sch. 1, tit. "Conveyance."

(*d*) *Id.*

(*e*) *Clayton v. Burtenshaw*, 5 B. & C. 41.

Form of an Assignment of a Term.

This indenture, made the — day of —, A.D. —, between J. N. of —, of the one part, and C. D. of —, of the other part: Whereas by an indenture of demise or lease, bearing date the — day of —, A.D. —, and made or expressed to be made between J. S. of the one part, and the said J. N. of the other part, the said J. S. for the considerations therein mentioned did demise and lease all that [&c.], to hold the same with the appurtenances unto the said J. N., his executors, administrators and assigns, from the — day of — then last past, for and during the full term of — years thence next ensuing, under and subject to the clear yearly rent of —, and to the several covenants, provisoes and agreements therein contained, which on the part of the said J. N., his executors, administrators and assigns, is and are thereby required to be paid, performed or reserved respectively. And whereas it is agreed by and between the said J. N. and the said C. D., that he the said J. N. [for and in consideration of the sum of —, to be well and duly paid unto him by the said C. D.,] would assign to the said C. D. all his right, title and interest to and in the premises aforesaid, and to and in the term so thereof granted as aforesaid: Now this indenture witnesseth, that in pursuance of the said last-mentioned agreement, and in consideration of [the sum of — aforesaid in the said agreement mentioned, “or” the sum of five shillings] to the said J. N. in hand, well and truly paid by the said C. D., at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said J. N. hath granted, bargained, sold, assigned, transferred and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over unto the said C. D., his executors, administrators and assigns, all the said [messuage or tenement, piece or parcel of ground], and all and singular other the premises comprised in

and expressed to be demised by the said hereinbefore in part recited indenture of lease of the — day of —, as hereinbefore is mentioned, with all and singular the rights, members, easements, privileges, advantages and appurtenances to the same premises belonging or therewith or with any part thereof now or usually occupied or enjoyed; together with the said hereinbefore in part recited indenture of lease [and all mesne assignments and under-leases, if any thereof], and all benefit and advantage of the same respectively, and of all and every the covenants, clauses, provisoes and agreements therein contained, which on the part of the lessor or landlord or any under-lessees or under-lessee of the said premises are to be performed or observed; and all the estate, right, title, interest, term or number of years now to come and unexpired, property, claim and demand whatsoever, both at law and in equity or otherwise howsoever, of him the said J. N., of, in, to or out of the same premises, and every part and parcel thereof, under or by virtue of the said indenture of lease: To have and to hold the said [messuage or tenement, piece or parcel of ground], and all and singular other the premises hereby assigned or mentioned or intended so to be, and every part and parcel of the same, with their and every of their respective rights, members, privileges, easements, advantages and appurtenances unto the said C. D., his executors, administrators and assigns, from henceforth, for and during all the residue or remainder of the said term or period of — years, in and by the said in part recited indenture of lease granted, which is or may be yet to come and unexpired by efflux and computation of time, and in such and the same and the like manner, and as beneficially to all intents and purposes as the said J. N. now holds or enjoys, or at or immediately before the sealing and delivery of these presents held or enjoyed the same,

subject nevertheless to the payment of the yearly rent in and by the said in part recited indenture of lease reserved, or such part thereof as by the tenant or lessee of the same premises is or ought to be paid for or in respect thereof, from and after the — day of — now last past, and to the performance and observance of the covenants, provisoes and agreements therein contained, which on his or their part or behalf are or ought to be observed or performed from and after the date of these presents. And the said J. N. for himself, his heirs, executors and administrators doth covenant, promise and agree with and to the said C. D., his executors, administrators and assigns, in manner following, (that is to say,) that for and notwithstanding any act, deed, matter or thing whatsoever, by him the said J. N. made, done, committed, executed or knowingly occasioned, suffered or omitted to the contrary, the said in part recited indenture or lease, mentioned to bear date the — day of —, is, at the time of the sealing and delivery of these presents, a good, valid and effectual lease, both at law and in equity, of and for the premises thereby expressed to be demised and hereby assigned or mentioned or intended so to be; and that the same and the term of — years therein mentioned to be thereby granted, and each of them, is in full effect and in nowise forfeited, surrendered, assigned, determined or become void or voidable, or otherwise prejudicially affected in any manner howsoever;

And that the yearly and other rents in or by the same indenture of lease reserved, and all arrears thereof, and also the land-tax, sewers-rate, and all other taxes, rates and assessments chargeable upon the said premises, or the tenant or occupier, or tenants or occupiers thereof for the time being, for or in respect of the same, have been and are well and truly paid and satisfied up to the said — day of — last past;

And that the several covenants and agreements therein contained, which on the part of the tenant or lessee of the same premises are required to be performed or ob-

served, have been well and truly observed and performed down to the date of these presents;

And also that for and notwithstanding any such act, deed, matter or thing as aforesaid, he the said J. N. now hath in himself good right, full power, and lawful and absolute authority to bargain, sell, assign, transfer and assure the said [messuage or tenement, piece or parcel of land], and all and singular other the premises hereinbefore assigned or intended so to be, and every part and parcel thereof, with their respective rights, members, easements and appurtenances, unto the said C. D., his executors, administrators and assigns, for and during all the residue and remainder which is now to come and unexpired, by computation of time, of or in the said term or period of — years so thereof granted as aforesaid, in manner aforesaid, and according to the true intent and meaning of these presents;

And that he the said C. D., his executors, administrators and assigns, shall and lawfully may, immediately from and after the execution of these presents, and from time to time and at all times thereafter, during the residue or remainder which is now to come and unexpired of or in the said term or period of — years, by the said in part recited indenture of lease expressed to be granted as aforesaid, peaceably and quietly enter into and upon, and have, hold, use, occupy, possess and enjoy the same [messuage or tenement, piece or parcel of land], and all and singular other the premises hereby assigned or mentioned or intended so to be, with their and every of their appurtenances, and receive and retain the rents, issues and profits thereof from the said — day of — last past, to and for his and their own use and benefit, without any action, suit, eviction, hindrance, molestation, disturbance or interruption whatsoever, of or by the said J. N., his executors or administrators, or any or either of them, or any person or persons now or hereafter rightfully claiming or possessing, either at law or in equity, any estate, right, title, charge or interest in, to, out of, or upon the said premises or any

part thereof, by, from, under or in trust for him, them, or any or either of them, or by or through his, their or any or either of their acts, deeds, defaults, means, procurement, consent or privity, [other than any person or persons claiming or entitled under or by virtue of any leases or agreements for leases, of which counterparts have been produced unto the said C. D., his counsel or solicitor, at or before the sealing and delivery of these presents, so far as concerns their respective estates and interests under or by virtue of the same]; and that free and clear, and clearly and absolutely acquitted, exonerated and discharged or otherwise, by and at the expense of the said J. N., his executors or administrators, well and effectually protected, defended, kept harmless, and indemnified from and against all and all manner of former and other assignments, gifts, grants, bargains and sales, mortgages, wills, conveyances, surrenders, assurances, rents, taxes, arrears of rents and taxes, statutes, judgments, decrees, recognizances, extents, exonerations, forfeitures, re-entry, and cause and causes of forfeiture and re-entry, jointures, legacies, estates, rights, titles, trusts, interests, charges and incumbrances whatsoever, which at any time heretofore have been, or which at any time hereafter shall or may be made, committed, created or knowingly occasioned or suffered by the said J. N., his executors or administrators, or any person or persons now or hereafter lawfully or equitably, and rightfully claiming or possessing any estate, right, title or interest by, from, under or in trust for him, them, or any or either of them (save and except and subject only to the rent or rents in and by the said hereinbefore in part recited indenture of lease, reserved or made payable from and after the — day of — last past, and the covenants and agreements therein contained, which on the part of the tenant, lessee or assignee of the said premises are from henceforth to be performed or observed during the now residue of the said term of — years, and save also and except such leases or agreements for leases as aforesaid, and the several

estates or interests now subsisting under or by virtue of the same respectively);

And moreover, that the said J. N., his executors and administrators, and all and every person and persons whomsoever, now or hereafter lawfully claiming or possessing any legal or equitable estate, right, title or interest in, to, out of, upon or respecting the said messuages or tenements, pieces or parcels of ground and other the premises hereinbefore assigned or mentioned or intended so to be [other than persons claiming and entitled under or by virtue of such leases or agreements for leases as aforesaid, so far as concerns their respective estates and interests under or by virtue of the same], shall and will, from time to time and at all times hereafter, before the expiration of the said term of — years, upon every reasonable request and at the proper costs and expense of the said C. D., his executors, administrators or assigns, make, do, execute and perfect, or cause and procure to be made, done, executed and perfected, all and every such further and other lawful and reasonable acts, deeds, conveyances and assurances in the law whatsoever, for the further, better, more perfectly and absolutely or satisfactorily assigning, confirming and assuring all and singular the same messuages or tenements and premises, with their respective appurtenances, unto the said C. D., his executors, administrators and assigns, for all the residue and remainder which shall be then to come and unexpired of the said term, as he the said C. D., his executors, administrators or assigns, or his or their counsel in the law, being of the degree of a barrister, shall advise and require, so that such further assurances or any of them do not contain or imply any further or more general covenants on the part of the person or persons who shall be required to make or execute the same, than for or against the acts, deeds, omissions or defaults of him, her or them, and of his, her or their lessors or assigns, or executors or administrators, and so that the person or persons who shall be required to make or execute the same be not oblige

to go from his, her or their then place or respective places of abode for that purpose, without a reasonable and sufficient sum being previously paid, tendered or secured to him, her or them, for or in respect of his, her or their time, trouble and expenses, which said acts, deeds and assurances shall, unless otherwise declared or expressed, be and enure in corroboration of these presents, and of the estate and interest hereby, or mentioned or intended to be hereby, assigned or otherwise assured.

And in consideration of the premises aforesaid, the said C. D. doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said J. N., his executors and administrators, in manner following, (that is to say,) that he the said C. D., his executors, administrators and assigns, or some or one of them, shall and will,—from time to time and at all times hereafter, during the residue or remainder which is now to come and unexpired of the said term or period of — years, or during such part or portion thereof, as he or they shall or lawfully may have and enjoy peaceable and quiet possession, under or by virtue of these presents, of the messuage, ground and premises expressed to be hereby assigned, according to the true intent and meaning hereof, against the said J. N., his executors and administrators, and all and every person and persons rightfully claiming from, under or in trust for him or them as afore-

said,—well and truly pay or cause to be paid the yearly rent of £—, in and by the said hereinbefore in part recited indenture of lease reserved, at such times and in such manner as the same is thereby reserved and made payable;

And also well and truly pay and satisfy all rates, taxes, duties, and assessments, chargeable upon or payable for or in respect of the said premises by the tenant, lessee, assignee or occupier thereof, from and after the — day of — now last past;

And also observe and perform all and every the covenants, provisoes, clauses, conditions, and agreements, which from henceforth during the same period on his or their part or behalf are or ought to be performed and observed, for and in respect thereof or of any part thereof;

And shall and will from time to time, and at all times hereafter, protect, defend, keep harmless and indemnified, the said J. N., his executors and administrators, and his and their lands and tenements, goods, chattels, and effects, from and against the same rents, covenants, and agreements, and of and from all actions, suits, costs, damages and expenses whatsoever, which he or they or any or either of them shall or may pay or sustain, or which shall or may arise or be occasioned by the non-payment, non-performance or non-observance thereof respectively, or any of them.

In witness, &c.

Formerly, when assignments were merely required to be in writing, the forms adopted were generally much shorter than the above; and were often written, by way of indorsement, upon the lease itself. But now that the assignment must be by deed, it will be more convenient that it should be a separate instrument. Where, however, the assignee of a term assigns to another, merely for the purpose of getting rid of his liability on the covenants in the lease, the form, of course, may be very much shorter, omitting all the covenants on the part of the assignor or assignee respectively contained in the above form.

SECTION VI.

Attornment.

An attornment is an admission by the party making it, that he holds the premises therein mentioned as tenant thereof to the party to whom he attorns. Formerly, in all cases where the owner of lands, which were let to tenants, conveyed to another his interest in them, it was necessary that the tenants should attorn to their new landlord, before his title was deemed complete. But by stat. 4 & 5 Ann. c. 16, s. 9, all grants or conveyances, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall or may be expectant or depending, as if their attornment had been had and made. Provided nevertheless, that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee (x).

And on the other hand, by stat. 11 G. 2, c. 19, s. 11, after reciting that the possession of estates in lands had been rendered very precarious, by the frequent and fraudulent practice of tenants, in attorning to strangers, who claim title to the estates of their respective landlords or lessors, who by that means are turned out of possession of their respective estates, and put to the difficulty and expense of recovering the possession thereof by actions or suits at law,—it is enacted that “all and every such attornment and attornments of any tenant or tenants of any messuages, lands, tenements or hereditaments, within that part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, shall be absolutely null and void to all intents and purposes whatsoever; and the possession of their respective landlords or lessors shall not be deemed or construed to be anywise changed, altered or affected by any such attornment or attornments: Provided always, that nothing herein contained shall extend to vacate or affect any attornment made pursuant to and in consequence of some judgment at law or decree or order of a court of equity,—or made with the privity and consent of the landlord or land-

(x) 4 & 5 Ann. c. 16, s. 10.

lords, lessor or lessors,—or to any mortgagee after the mortgage is become forfeited.”

Upon these statutes it is, that the practice of attornments at present depends. It is not necessary, where a lessor assigns his reversion. So, where lands are mortgaged, which at the time are let to tenants, it is not necessary that the tenants should attorn to the mortgagee, to entitle him to the rents of the mortgaged property; for as he is assignee of the reversion, he has his remedy by law against the tenant without attornment. All that is necessary for him to do, is, to give the tenant notice to pay the rents to him, in order to prevent such tenant paying them over to the mortgagor (y). But if after the mortgage, the mortgagor let the lands to a tenant, and under circumstances that he cannot be deemed the agent of the mortgagee in doing so, the mortgagee must get an attornment from the tenants, or get them to do that which is virtually an attornment, namely, to pay rent to him; for his merely giving them notice to pay their rents to him, will not in that case constitute any tenancy between them, so as to enable him to distrain for the rent (z).

So, where lands are recovered in ejectment, and it is not the wish or intention of the lessor of the plaintiff to disturb the tenant who is in the occupation of the premises, it is usual for the tenant to attorn to the plaintiff, under the proviso in stat. 11 G. 2, c. 19, s. 11, above mentioned.

Upon attornment the tenant continues to hold on the same terms as he held under his former landlord (a); but as tenant from year to year only (b). And in such a case, the attornment does not require a stamp, even although it expressly state that he is to hold at the same rent, &c. (c). But if it state expressly that he is to hold on different terms, or on such terms as should thereafter be agreed upon (and which might or might not be different from the former terms), there the instrument is no longer an attornment, but an agreement for a new tenancy, and must be stamped accordingly (d).

Where a man thus attorns tenant to another, he is not thereby estopped from disputing his title; for he may by mistake have attorned to a person who has no title (e). But subject to this, the landlord has all the remedies against the per-

(y) See 4 & 5 Ann. c. 16, s. 10, *supra*.

(z) *Evans v. Elliot et al.*, 9 Ad. & El. 342.

(a) *Per Holroyd, J.*, in *Cornish et al. v. Scarell*, 8 B. & C. 476, 471.

(b) *Doe v. Boulter*, 6 Ad. & El. 675.

(c) *Doe v. Edwards*, 5 Ad. & El.

95; and see *Doe v. Smith*, 8 Ad. & El. 255.

(d) *Cornish et al. v. Scarell*, 8 B. & C. 471.

(e) *Cornish et al. v. Scarell*, *supra*. *Gracenor v. Woodhouse et al.*, 1 Bing. 38. *Gregory v. Doidge et al.*, 3 Bing. 474.

son who thus attorns to him, that he would have against a tenant to whom he had demised the premises; and amongst others, he may distrain upon him for rent in arrear; and if he bring replevin, and plead *non tenuit* to an avowry for the rent, the attornment will be good evidence for the landlord in proof of the holding (*f*).

CHAPTER II.

The Tenancy, how dissolved.

SECTION I.

Dissolution of the Tenancy, by Effluxion of Time, &c.

A lease for life determines of course upon the death of the party.

A lease for a term of years, is not determined until the last moment of the anniversary of the day from which the tenant was to hold, in the last year of the tenancy (*g*).

A tenancy at will may be determined, either expressly, or by matter of implication. The mode of determining it expressly, by either party, is by a demand of possession on the part of the lessor, or by an express declaration by the lessee that he will hold no longer; and which, if made off the land, must be by a notice in writing (*h*). If the lessor determine his will verbally, it must be upon the land (*i*); and where a demand of possession was made upon the premises to the wife of the under-tenant, it was holden to determine the will, and that the lessor might thereupon bring an ejectment (*k*). But a mere verbal declaration of the lessee, that he will not hold the lands any longer, does not determine the estate, unless he also waive the possession (*l*). A determination of the will, however, may be implied from any act of ownership exercised by the lessor, which is inconsistent with the nature of the estate: as if he make a feoffment, and give livery of seisin upon the land, even although the lessee be not present nor assent to it (*m*); or make a lease of the lands, to commence immediately (*n*); or enter upon the land and cut timber (*o*); or do

(*f*) *Gravenor v. Woodhouse et al.*, 1 Bing. 38; 2 Id. 71.

(*g*) *Ackland v. Lutley*, 9 Ad. & El. 879.

(*h*) Co. Lit. 55. b.

(*i*) Id.

(*k*) *Roe v. Street*, 4 Nev. & M. 42.

(*l*) Co. Lit. 55. b, 57. a.

(*m*) *Ball v. Cullimore*, 2 Cr. M. & R. 120.

(*n*) *Dinsdale v. Iles*, 2 Lev. 88.

(*o*) Co. Lit. 55. b.

any other act showing that he has determined the will:—this will have the effect of putting an end to the lessee's interest. And on the other hand, any act of desertion by the tenant, or other act inconsistent with this estate, will operate as a determination of the estate: as if he assign over the land to another, or commit an act of waste, his estate is thereby determined (*p*). And lastly, if either party die, or be outlawed, the estate is thereby determined (*q*).

A tenancy at sufferance, is determined by a mere entry; no demand of possession or other notice is necessary.

SECTION II.

Dissolution of the Tenancy, by Surrender.

Generally.] A surrender is a yielding up, by mutual agreement, of an estate for life or years, to him who hath an immediate estate in reversion or remainder wherein the estate for life or years may merge (*r*). And livery of seisin is not essential to its completion, although it be a surrender of a lease for life or lives (*s*).

It may be by any person, in whom the estate for life or years is vested at the time,—the lessee or the assignee of the term,—and who by law is capable of alienating his lands. Infants, married women and lunatics, may by petition or motion to the court of Chancery be enabled to surrender leases, and to accept new leases of the same premises,—the infant by his guardian or other person on his behalf, the married woman by any person on her behalf, and the lunatic by his guardian, or the committee of his estate or other person on his behalf (*t*). A lessee thus surrendering, however, must be in possession (*u*): and therefore a lessee for years cannot surrender his term, until after he have entered upon the demised premises, for until entry there is no reversion into which the term may merge (*v*). So if a lessee for life or years be ousted by a stranger, and afterwards surrender to his lessor, the surrender is void (*w*). And for the same reason, there can be no surrender of a lease which is to commence at a future day, until the lessee is entitled to and has obtained possession: for until then there is no reversion, into which the term can merge (*x*). But this reason does not apply to the assignee

(*p*) Co. Lit. 55. b.

(*q*) Co. Lit. 55. b. 57. a; 5 Co. 116.

(*r*) Co. Lit. 337. b.

(*s*) Co. Lit. 50. 2 Bl. Com. 326.

(*t*) 29 G. 2, c. 31; 16 & 17 Vict. c. 70, s. 113.

(*u*) Co. Lit. 338.

(*v*) 2 Ro. Abr. 494, 495.

(*w*) Perk. s. 599, 600, 601.

(*x*) Co. Lit. 338. 5 Co. 11. 10 Co. 53. Cro. Eliz. 522, 605. Poph. v. 2 Ro. Abr. 490.

of the term, if the lessee have entered, because by the entry of the lessee, the possession was severed from the reversion; and therefore it has been holden that the assignee of a term may surrender it, before entry (*y*). And there must also be a privity of estate, between the surrenderor and the surrenderee, otherwise the surrender is void. A surrender by the lessee, or the assignee of the term, to the lessor or his assignee, is good, because there is a privity of estate between them; but a surrender by an under-lessee to the original lessor would be bad, for there is no such privity between them. So, it has been holden that a lessee could not surrender his term to sequestrators appointed by the court of Chancery; it must be to the lessor himself, or some party legally entitled under him (*z*). But it has been holden that the lessee and his under-lessee may join in a surrender to the original lessor, and that such a surrender would be good (*a*).

The surrender must be to the person who has the immediate reversion or remainder expectant upon the determination of the term surrendered. If A., the owner of the fee, let to B. for life or years, B. may surrender his term to A., for he has the immediate reversion. Again, if A., the owner of the fee, let to B. for twenty years, and B. underlet to C. for ten years, C. may surrender his term to B. (*b*); but C. cannot surrender to A., because of the reversion of B. intervening (*c*). But if in such a case B. were first to surrender his term to A., C. might afterwards surrender his term to A. also, because by the surrender of B., the reversion of A. has become the immediate reversion upon the term of C., the estate of B. no longer intervening (*d*). If, however, A. had made a lease to B. for years, and a lease in remainder to C. for years, it was formerly doubted whether B. could not surrender to C. (*e*). But it has since been decided that A., in such a case, by making the lease to C., does not thereby part with his reversion, so as to prevent him from distraining on B. for rent in arrear (*f*); and it follows from that decision, that B. could not surrender to C. On the other hand, it is clear that C., although he might assign, could not surrender to B. By stat. 8 & 9 Vict. c. 106, s. 9, "when the reversion expectant on a lease, made either before or after the passing of this Act, of any tenements or hereditaments, of any tenure, shall after the 1st October, 1845, be surrendered or merge,—the estate which shall for the time being confer (as against the tenant under the same lease) the

(*y*) Id. Bac. Abr. Lease, S. 2.

(*z*) *Corrish v. Scarell*, 8 B. & C. 471.

(*a*) Plowd. 541.

(*b*) Cro. El. 302. Poph. 30. 2 Vent. 326. Co. Lit. 218. b. See

Cro. El. 173. 1 Leon. 303, 323.

Owen, 97, *semb. cont.*

(*c*) Perk. s. 604.

(*d*) Id.

(*e*) See Co. Lit. 173. Perk. s. 589.

(*f*) *Smith v. Day et al.*, 2 Mees. & W. 684.

next vested right to the same tenements or hereditaments, shall (to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted,) be deemed the reversion expectant on the same lease."

The estate which may thus be surrendered, may be for life or years. An estate at will is not the subject of a surrender; because, as it is holden at the will of both parties, either may determine his will, without the formality of a surrender (*g*); and the very act of surrendering, would be a determination of the will.

Surrender by deed.] By stat. 29 Car. 2, c. 3, s. 3, no leases, estates or interests, either of freehold or terms of years or any uncertain interest, (not being copyhold or customary interest,) of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall be surrendered, unless it be by deed or note in writing, signed by the party so surrendering the same, or his agent thereunto lawfully authorized in writing,—or by act and operation of law. These latter words have reference to a surrender in law, which shall be noticed presently.

And by stat. 8 & 9 Vict. c. 106, s. 3, a surrender in writing, of an interest in any tenements or hereditaments, (not being a copyhold interest, and not being an interest which might by law have been created without writing,) made after the 1st October, 1845, shall be void at law, unless made by deed; Provided that this shall not extend to Ireland.

The technical and proper words of a surrender are "surrender and yield up;" but any form of words, by which the intention of the parties is sufficiently manifested, will be deemed to operate as a surrender (*h*). As for instance, if a lessee for years remise, release, discharge and for ever quit claim to his lessor all his right, title and interest to or in the lands demised, this would be a surrender (*i*). So, where the assignee of a term for years agreed with the lessor, that he should have the premises on the terms mentioned in the lease, and to pay 8*l.* 10*s.* over and above the rent, annually, towards the good will already paid for by the assignee: it was holden that this operated as a surrender of the whole term (*k*). So, where by an agreement between the landlord and tenant of a farm, the tenant was to give up possession, and the landlord was to take the stock at a valuation, to make compensation for fallows, &c., to pay the taxes, and to permit the tenant to keep possession of part of the buildings until a certain day

(*g*) Cro. El. 150. 12 Mod. 70.

(*i*) Dy. 251, pl. 91, 93. Cro. El. 2.

(*h*) 4 Cruise, 93, s. 4. Bac. Abr.

Cro. Jac. 109. Lev. 144.

Lease, S. 1, s. 1.

(*k*) *Smith v. Mapleback*, 1 T. R. 441.

without payment of rent, &c.: this was holden to operate as a surrender of the term, but that not being on a deed stamp, it could not be given in evidence (*l*). So, if lessee for life grant, surrender and release to him in reversion, or even if the word surrender be omitted, it will operate as a surrender (*m*); but a mere release would not have that effect, on account of the repugnancy, the lessee being in possession, but the release supposing the possession to be in the lessor (*n*). So, where A., tenant in fee, leased to B. for years, and some time afterwards B. made an under-lease to C. for the residue of the term excepting the last twenty-one days; afterwards, by a deed-poll, indorsed on the counterpart of the lease to C., B. granted, sold, assigned, transferred and set over to A., the lease to C., and the premises thereby granted, and all his (B.'s) estate, right, title, interest, time and term of years then to come and unexpired, possession, property, benefit, claim and demand whatsoever of, in and to the premises, to have and to hold the said premises for all such time and term therein as in the lease to C. was mentioned: it was holden that this passed to A. merely the term C. had in the premises; and as B. had still a reversion of twenty-one days intervening between that and the reversion in fee, that term could not merge in the reversion, and consequently the deed-poll of B. could not be deemed a surrender (*o*). So, where a lease recited that it was granted partly in consideration of a surrender of a former lease, this was holden not to be a surrender in writing, within the meaning of the statute of frauds, mentioned *ante*, p. 85; for no words were used which could imply a surrender (*p*).

The stamp required on a surrender of "any term or terms of years, or of any freehold or uncertain interest in any lands or hereditaments, not being of copyhold or customary tenure," is 1*l.* 15*s.*; and if it contain 2,160 words, then 1*l.* 5*s.* for every 1,080 words over and above the first 1,080 (*q*).

Surrender in law.] By the statute of frauds, *ante*, p. 85, a surrender must be by deed or note in writing, or "by act and operation of law." A surrender in law is, where a lessee accepts a new lease of the same premises from the reversioner, either to commence presently, or at any distance of time during the term mentioned in the old lease; for to enable the lessor to perfect and make good his second contract, the lessee must

(*l*) *Williams v. Sawyer*, 3 Brod. & B. 70. And see *Gore v. Wright*, 8 Ad. & El. 118. *Weddall v. Capes*, 1 M. & W. 50.

(*m*) Bac. Abr. Lease, S. 1, s. 1.

(*n*) Jenk. 195, ca. 2.

(*o*) *Burton v. Barclay et al.*, 7 Bing. 745, S. P. Bulst. 203, 204;

1 Ro. Rep. 387; 2 Ro. Abr. 497, 498. 2 Mod. 176.

(*p*) *Roe v. Archbp. of York*, 6 East, 86.

(*q*) 55 G. 3, c. 184, Sch. 1, "Surrender." See *Doe v. Stagg*, 5 Bing. N. C. 564.

be supposed to waive and relinquish all benefit of the first (*r*). And the statute of frauds thus allows of it, for the new lease being in writing, it is of equal notoriety with a surrender in writing (*s*). And it is immaterial whether the term acquired by the second lease, be greater or less than that which the lessee had under the former lease, or whether the new lease is to have immediate operation or not; for by accepting the new lease, the lessee admits that the lessor had power to make it, which he could not have had, if the old lease had not been surrendered (*t*). Therefore if a lessee for thirty years accept a new lease for three years to commence ten years hence, this is presently a surrender of the old lease (*u*). And this is the case, even where the new lease is voidable, provided it be not void. And therefore where a husband seised of lands in fee, made a lease for years, and then enfeoffed certain persons and took an estate to himself and his wife in tail; after which the tenant applied for and obtained from the husband a new lease of the same premises: upon the death of the husband during the latter term, the tenant was evicted by the widow; and the court held that she had a right to do so: the acceptance of the new lease was a surrender in law of the old one, and the new lease being after the feoffment, and voidable by the wife as being made by the husband alone, she had a right to enter (*v*). And the same, although the new lease be conditional merely; as if a lessee for years accept a new lease, upon condition that if he do not a certain act, such new lease shall be void, and he break the condition so that the lease becomes void: yet his acceptance of that lease was a surrender in law of the former one (*w*). So, where a new lease by a bishop, voidable as against his successor, was granted to a lessee under a former lease, and the successor afterwards avoided the new lease: it was holden that this had not the effect of reviving the old lease (*x*). But if the new lease be absolutely void, the acceptance of it will not be deemed a surrender of the old lease (*y*). So where the new lease was made by tenant for life, for ninety-nine years, expressly under a power, to a person then having a valid lease, but it was not made in conformity with the terms of the power, and was therefore void: it was holden that the acceptance of this second lease was not a surrender in law of the first one (*z*). So, if it be not certain that the second lease is to commence during the term

(*r*) Bac. Abr. Lease, S. 2, s. 1.

(*s*) 4 Cruise, 94, s. 7.

(*t*) Id.

(*u*) Id.

(*v*) Dy. 140. 2 Ro. Abr. 493.

(*w*) Plowd. 107. Co. Lit. 218. b.

(*x*) Doe v. Bridges, 1 B. & Ad. 847.

(*y*) Per Id. Mansfield, C. J., in *Zouch v. Parsons*, 3 Burr. 1807. *Watt v. Maydwell*, Hut. 104; Lit. Rep. 268.

(*z*) *Roe v. Archbp. of York*, 6 East, 86. *Doe v. Poole*, 17 Law J. 143, qb. *Doe v. Courtney*, 17 Law J. 151, qb.

granted by the first lease, the acceptance of the former is not a surrender in law of the latter. As if lessee for twenty-one years, accept a new lease of the same premises to commence immediately after the death of J. S., this will be no surrender in law of the former lease, because *non constat* that J. S. may not outlive the first term, in which case the second lease could not be deemed a surrender of the first (*a*). Also, if the lessee of certain premises accept a new lease of part of them only, this shall be deemed a surrender in law of the old lease, only so far as respects that part of the premises comprised in the new lease (*b*).

So, where B., tenant from year to year of certain premises, and C. agreed, during a current year, with A. the landlord, for a lease of the premises to be granted to B. and C., and C. thereupon entered, and he and B. occupied the premises jointly for about six months: this was holden to be a surrender in law of the term from year to year, although the lease agreed for was never in fact granted (*c*). So, where A., the tenant for a term of years of a house, several cottages, a stable and yard, becoming embarrassed during the term, agreed to assign his interest to B., and B. took possession of the stable and yard, which were the only parts of the premises he occupied, the house and cottages being occupied by other tenants; this was in the middle of a quarter, and A. paid to the landlord his rent for the whole of the premises up to the half quarter, which the landlord received without objection, the landlord afterwards received the rent from the different tenants, and upon the cottages becoming unoccupied, he let them to other tenants, and at last advertized the whole of the premises to be let or sold: these circumstances, taken together, were holden to amount to a surrender in law of the first term (*d*). But a surrender is not to be presumed, merely from the fact of the rent being paid by a third party, and not by the original tenant (*e*). Even a cancelling of the lease, is not deemed a surrender of the term, either in law or in deed (*f*). As to the effect of cancelling a lease, see *Bac. Abr. Lease, T*.

Formerly a lease for lives or years could not be renewed, without a surrender, not only of the lease itself, but of all the under-leases which had been derived out of it; so that it was in the power of the under-tenants to prevent or delay the renewal of the principal lease, by refusing to surrender their

(*a*) 4 Leon. 30.

(*b*) *Fish v. Campion*, 2 Ro. Abr. 498.

(*c*) *Hamerton v. Stead*, 3 B. & C. 478.

(*d*) *Reeve v. Bird*, 1 Cr. M. & R. 31. And see *Nicholls v. Atherstone*, 16 Law J. 371, qb.

(*e*) *Copeland v. Watts*, 1 Stark.

96. *Doe v. Wood*, 15 Law J. 41, ex.

(*f*) *Doe v. Thomas*, 9 B. & C.

288. *Roe v. Archbp. of York*, 6

East, 86. *Wootley v. Gregory*, 2

Young & J. 586. *Magenis v. Mac*

Cullogh, Gilb. Eq. Rep. 236.

under-leases. But by stat. 4 G. 2, c. 28, s. 6, reciting this, it is enacted, that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the under-leases, be as good and valid to all intents and purposes, as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease: and all and every person and persons, in whom any estate for life or lives or for years shall from time to time be vested by virtue of such new lease, and his, her and their executors and administrators, shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands, and tenements in the respective under-leases comprised, as if the original leases out of which the respective under-leases are derived, had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, lands, tenements and hereditaments comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease.

Effect of it.] The effect of a surrender, as between the parties, is, that the term granted by the lease is thereby merged and destroyed, and the lease itself is at an end. But the rights of strangers are not affected by it; they are preserved. Thus, if a tenant for life grant a rent-charge, and afterwards surrender his estate, the rent-charge continues (g). So, if a lessee for life make a lease for years, and afterwards surrender his estate, the lease for years continues; and yet the reverser shall not have the rent reserved by it (h). Even where a lessee for life of copyhold premises, which were only demisable by copy, made a lease of them for years to J. S., and afterwards surrendered his own lease to the lord of the fee: it was holden that this surrender did not affect the validity of the lease of J. S., which was good as against the lord of the fee, as well as against the lessor, notwithstanding the surrender of the superior lease (i).

(g) Touch. 301. 4 Cruise, 92, s. 3. Co. Lit. 338. b. Per Id. Ellenborough, C. J., in *Doe v. Pyke*, 5 M. & S. 154.

(h) Id.

(i) *Doe v. Pyke*, 5 M. & S. 140.

Form of a Surrender of a Lease by indorsement.

To all to whom these presents shall come, the within-named J. N. sendeth greeting: Whereas [*recite the motive for the surrender*]; Now these presents witness, that in pursuance of the said agreement, and for and in consideration of the sum of —, of lawful money of Great Britain, to the said J. N., in hand paid by the said J. S. at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, He the said J. N., Hath bargained, sold assigned, surrendered, and yielded up, and by these presents Doth bargain, sell, assign, surrender, and yield up unto the said J. S., and his heirs, All that [&c.], and all other the premises in and by the within written indenture of lease demised to the said J. N., with all and every the rights, easements, and appurtenances to the same belonging; And all the estate, title, interest, term of years yet to come and unexpired, property, claim, and demand whatsoever of him the said J. N., in, to, or out of the said premises, and every or any part thereof, together with the within written indenture of lease and counterpart of lease by him the said J. S., granted or demised of the premises, or any part thereof; To have, take, and receive the messuages [&c.] and premises, and estate and interest hereby surrendered, or intended so to be, with their and every of their rights, members, and appurtenances, unto him the said J. S., his heirs and assigns, for all the residue or remainder now to come and unexpired by effluxion of time, of or in the same messuages [&c.] and premises, to and for the end, intent, and purpose that all and singular the same messuages [&c.] and premises, and estate and interest, shall or may henceforth become and be merged and extinguished in or consolidated with the freehold, reversion and

inheritance thereof; and the said J. N., for himself, his heirs, executors and administrators, doth hereby covenant, promise, declare and agree with and to the said J. S., his executors, administrators and assigns, in the manner following, (that is to say): that he the said J. N. hath not at any time or times heretofore made, done, executed, committed, or knowingly omitted or suffered, nor been party or privy to any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said messuages [&c.] and premises hereby surrendered or intended so to be as aforesaid, or any part or parcel thereof, or any estate or interest therein respectively, are, is, can, shall, or may be in anywise impeached, charged, incumbered or prejudicially affected in estate, title, value or otherwise howsoever. And the said J. N. for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree with and to the said J. S., his heirs and assigns, that he the said J. N., his executors and administrators, shall and will, from time to time and at all times hereafter, at the request and costs and charges in the law of the said J. S., his heirs or assigns, make, do, and execute all such further and other lawful and reasonable assignments, surrenders, and assurances whatsoever, for the further and better or more satisfactorily surrendering the aforesaid messuages [&c.] and premises, and the estate and interest of him the said J. N. therein, unto the said J. S., his heirs or assigns, for all the then residue of the term demised by the within written indenture, as he the said J. N., his heirs or assigns, or his or their counsel in the law, being of the degree of a barrister, shall advise and require.

In witness, &c.

SECTION III.

Notice to quit.

In what cases.] A notice to quit is required by law, or by local custom, or by express stipulation between the parties. In the latter case, the notice must be such as has been agreed upon, whether the same would be required by law, or be sufficient, if no such stipulation existed, or not (*a*). And therefore if it be agreed between the parties that the tenant shall quit at a quarter's notice, of course a quarter's notice only is necessary (*b*). Where it is required by local custom, the custom will be considered as engrafted upon and forming part of the contract between the parties, and must be complied with.

In the absence of express stipulation or local custom upon the subject, if a tenant holds his land or house, &c. from year to year, expressly or impliedly, either the landlord or he may determine the tenancy, by giving a half year's notice to quit (*c*), ending with the year of the tenancy (*d*): as if the tenant hold from Christmas to Christmas, the notice must be given half a year at least before Christmas, to quit at Christmas. So, if the year of the tenancy end on the 25th March, a notice to quit given on the 28th September preceding, will be sufficient (*e*). And half a year's notice must thus be given, although the rent be payable quarterly or otherwise (*f*). And the same where a tenancy from year to year is implied by law, from holding over, or from the payment of rent, or the like (*g*). So, such notice must be given by a remainderman, when he becomes entitled in possession to land previously let to a tenant from year to year, before such tenancy can be determined (*h*); and the notice must be a half year's notice ending with the year of the tenancy (*i*). But if the tenancy were such as to be determined by the death of the tenant for life, the remainderman may of course recover the premises in ejectment,

(*a*) See *Doe v. Raffan*, 6 Esp. 4. *Doe v. Bell*, 5 T. R. 471. *Doe v. Dobell*, Q. B. 806. *Berrey v. Lindley*, 11 Law J. 27, cp.

(*b*) See *Doe v. Green*, and the other cases cited *post*, p. 95.

(*c*) *Parker v. Constable*, 3 Wils. 25.

(*d*) *Right v. Darby*, 1 T. R. 150. *Doe v. Bell*, 5 T. R. 271.

(*e*) *Roe d. Durrant v. Doe*, 6 Bing. 574.

(*f*) *Spirley v. Newman*, 2 Esp. 206.

(*g*) See *Doe v. Stennett*, 2 Esp. 217. *Doe v. Watts*, 7 T. R. 83. *Denn v. Rawlings*, 10 East, 201. *Doe v. Browne*, 8 East, 166. *Doe v. Noden*, 2 Esp. 530. *Roe v. Ward*, 1 H. Bl. 97. *Doe v. Walker*, 7 T. R. 478. *Doe v. Pullen*, 2 Hodg. 39. *Doe v. Dodd*, 2 Nev. & M. 838. *Doe v. Ltnes*, 17 Law J. 108, qb.

(*h*) *Maddon v. White*, 2 T. R. 150.

(*i*) *Doe v. Ward*, 1 H. Bl. 97. *Doe v. Walker*, 7 T. R. 478.

without giving any previous notice to quit, unless he have impliedly created a tenancy from year to year with the occupying tenant, by receiving rent from him (*k*), or the like. So, an incumbent may maintain ejectment for the glebe land, against the tenants from year to year of his predecessor, without giving notice to quit (*l*). And where the tenancy by agreement was at a rent of 42*l.* a year, "until one of the parties should give to the other six calendar months' notice in writing to quit at the expiration of any such notice," it was holden that the notice might be given at any time, and that it was not necessary that it should end with the year of the tenancy (*m*).

In like manner, if the tenancy be from half year to half year, half a year's notice to quit must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice; and if from week to week, a week's notice (*n*); if there be an usage to that effect (*o*), and there be no express stipulation to the contrary (*p*).

But where the tenancy, by express stipulation, is to end on a certain day, then a notice to quit is not necessary (*q*). Nor is it necessary, where the tenant holds under an adverse title (*r*), or has done any act which amounts to a disclaimer or disavowal of his lessor's title (*s*). Nor is it necessary to be given by a mortgagee to the mortgagor, even although he have stipulated to pay the interest in the name of rent, or have actually attorned tenant to the mortgagee (*t*). Nor is it necessary to be given by the mortgagee to the tenant in possession (*u*), if the tenancy were created by the mortgagor after the date of the mortgage (*v*); nor by a tenant by elegit, if the tenancy have been created by the creditor after the date of the judgment (*w*); nor by a master, whose servant occupies the premises in question (*x*). And where by a contract for the

(*k*) *Doe v. Morse*, 1 B. & Ad. 365.
Doe v. Forward, 11 Law J. 321,
qb.

(*l*) *Doe v. Carter*, Ry. & M. 237.

(*m*) *Doe v. Grafton*, 21 Law J.
276, qb.

(*n*) See *Doe v. Hazell*, Esp. 94.
Doe v. Raffan, 6 Esp. 4. *Toivne v.*
Campbell, 16 Law J. 128, cp.

(*o*) See *Huffell v. Armistead*, 7
Car. & P. 56.

(*p*) See 6 East, 124, n., per *Ld.*
Mansfield.

(*q*) *Cobb v. Stokes*, 8 East, 358.
Messenger v. Armstrong, 1 T. R.
54.

(*r*) *Doe v. Williams*, Cowp. 622;
and see *Doe v. Quigley*, 2 Camp.
505. *Doe v. Bradbury*, 2 D. & R.
706.

(*s*) *Doe v. Pasquali*, Peake, 196.
See *Doe v. Cooper*, 1 M. & Gr. 135.

Doe v. Pitman, 2 Nev. & M. 72.
Doe v. Parker, Gow. 180. *Doe v.*
Evans, 9 Mees. & W. 48. *Doe v.*
Grubb, 10 B. & C. 816. *Doe v.*
Long et al., 9 Car. & P. 773.

(*t*) *Doe v. Tom*, 12 Law J. 264,
qb. *Doe v. Davies*, 21 Law J.
60, ex.

(*u*) *Doe v. Pullen*, 2 Bing. N.
C. 749.

(*v*) *Keech v. Hall*, 1 Dougl. 21.
Thunder v. Belcher, 3 East. 449.
Doe v. Boulton, 6 M. & S. 148.
See *Doe v. Goldwin*, 10 Law J.
275, qb.

(*w*) *Doe v. Hilder*, 2 B. & A. 782.
(*x*) *Doe v. Derry*, 9 Car. & P.
494.

purchase of land, the vendee was let into possession immediately, and was to pay five per cent. interest on the purchase money, if the contract were not completed within three months, until its completion; the contract was not completed within the time, and he remained in possession, but paid no interest: it was holden that the vendor might maintain ejectment against the vendee without giving a notice to quit, as the latter was nothing more than a tenant at will (*y*).

By landlord.] It must be given by the landlord, or by the person who may have succeeded him in the title, as heir, assignee, &c., or by his agent (*z*). A notice to quit given by one of two joint-tenants, will have the effect of determining the tenancy as to his moiety (*a*); but if it be intended to determine the tenancy as to all, if given by one, it must either be signed by all, or given expressly on the behalf of all (*b*). If given by an agent on behalf of all, it will determine the tenancy as to all, although he be authorized by one of them only (*c*); and it is sufficient if his authority be subsequently recognized by them (*d*), provided such recognition be before the day of the demise laid in the declaration (*e*). But if a notice to quit be given by the agent of an agent, it is not sufficient, unless it be recognized by the principal (*f*). If the notice be given by a corporation, it will be sufficient if it be signed by their steward, without proving that he had authority under seal to do so (*g*). The authority may also in some cases be implied from other acts which the agent is expressly authorized to do: as for instance, a receiver appointed by the court of Chancery, with a general authority to let the land to tenants from year to year, has thereby also authority to determine such tenancies by a regular notice to quit (*h*).

It must be given to the landlord's immediate tenant (*i*), or to his executor or other personal representative (*k*), or assignee (*l*); but not to an under-tenant (*m*). And where notice was given to the tenant, and he gave notice to his under-tenants to quit at the same period; and upon the expiration

(*y*) *Doe v. Chamberlaine*, 9 Law J. 38, ex.

(*z*) See *Doe v. Phillis*, 2 Chlt. 170. *Roe v. Pearce*, 2 Camp. 96. *Doe v. Read*, 12 East, 57.

(*a*) *Doe v. Chaplin*, 3 Taunt. 120.

(*b*) *Doe v. Summersett*, 1 B. & Ad. 135. *Doe v. Hulme*, 2 M. & R. 433. *Doe v. Hughes*, 10 Law J. 185, ex.; and see *Alford v. Vickery*, Car. & M. 280.

(*c*) *Doe v. Hughes*, 7 Mees. & W. 139.

(*d*) *Goodtitle v. Woodward*, 3 B. & A. 689. *Doe v. Sybourn*, 2 Esp.

877; but see *Doe v. Walters*, 10 B. & C. 626.

(*e*) *Doe v. Walters*, *supra*.

(*f*) *Doe v. Robinson*, 3 Bing. N. C. 677.

(*g*) *Doe v. Pierce*, 2 Camp. 96.

(*h*) See *Doe v. Read*, 12 East, 57.

(*i*) See *Lake v. Smith*, 1 B. & P. 174.

(*k*) *Doe v. Porter*, 3 T. R. 13. *Parker v. Constable*, 3 Wils. 241.

(*l*) *Doe v. Williams*, 6 B. & C. 41.

(*m*) *Pleasant v. Benson*, 14 East, 234.

of the notice he quitted so much of the demised premises as he occupied himself, but his under-tenants refused to quit : it was holden that an ejectment would lie against him for so much as his under-tenants had not given up (*x*). Where the premises were holden by two tenants in common, a notice served upon one of them was holden to determine the entire tenancy (*y*) ; at least it raises a presumption that the notice reached the other tenant in common, although he possibly live at a distance (*z*).

By tenant.] If a notice to quit be given by the tenant, it should be given to his immediate landlord, or the person to whom he is bound to pay his rent, or to his landlord's agent ; and not to any head landlord or person under whom his immediate landlord claims. In other respects the same rules apply to this notice as to a notice to quit by a landlord. If in this notice a mistake be made as to the expiration of the year or month, &c. of the tenancy, it will not have the effect of determining the holding, and the tenant himself may take advantage of the defect ; it is not good as a notice to quit, nor does it operate as a surrender, inasmuch as it is to take effect *in futuro* (*a*).

Form and service.] A notice to quit is usually in writing, and in prudence should be so ; but a parol notice to quit, given by a tenant holding under a parol lease, has been deemed sufficient (*b*), even though given on the part of a corporation (*c*). No particular form is necessary : if it indicate to the tenant, with sufficient certainty, that he is to quit the premises at a certain period, it is sufficient. Where the notice was, " I desire you to quit the possession at Lady-day next of, &c., or I shall insist upon double rent for the same," it was holden sufficient ; although it was urged that the addition of the latter clause made it optional with the tenant to remain in possession upon payment of double rent (*d*). It is usually directed to the tenant ; but this is not necessary, if it be personally served upon him (*e*). Care must be taken that the time at which it requires the tenant to quit, be the expiration of the year or month of his tenancy (*f*). Even where a tenancy from year to year was created, with an express stipu-

(*x*) *Roe v. Wiggs*, 2 New Rep. 330.

(*y*) *Doe v. Crisp*, 5 Esp. 196.

(*z*) *Doe v. Watkins*, 7 East, 551.

(*a*) *Doe v. Milward et al.*, 3 Mees. & W. 328.

(*b*) *Timmins v. Rawlinson*, 3 Bur. 1603. *Doe v. Crick*, 5 Esp. 196.

(*c*) *Roe v. Pierce*, 2 Camp. 96.

(*d*) *Doe v. Jackson et al.*, 1 Doug. 175.

(*e*) *Doe v. Wrightman*, 4 Esp. 5, and see *Doe v. Spiller*, 6 Esp. 70.

(*f*) See *Roe v. Ward*, 1 H. Bl. 97. *Doe v. Walker*, 7 T. R. 478. *Doe v. Donovan*, 1 Taunt. 555. *Kempt v. Derret*, 3 Camp. 510, and see *Doe v. Lambley*, 2 Esp. 635.

lation that either party might determine it by a three months' notice to quit: it was holden that it must be by a notice ending with the year of the tenancy, and that the tenancy could not thereby be determined, until the end of the second year (g). Any mistake in the notice in this respect, will be fatal (h). But where a notice was, to quit at Michaelmas, Parke, B., held that it was a good notice either for Old or New Michaelmas-day; and it appearing that the holding was from Old Michaelmas, he held that although *primâ facie* it would be deemed a notice to quit at New Michaelmas, yet as the holding was from Old Michaelmas, it was a sufficient notice for that time also (i). And where a notice served at Michaelmas, 1795, required the tenant to quit at Lady-day "which will be in the year 1795," instead of 1796; the court held that these latter words might be rejected, and that the notice was sufficient (k). In order to avoid an objection on this ground, however, the notice now usually requires the tenant to quit at the end and expiration of the current year of his tenancy, which shall expire next after the end of one half year from the date thereof; and which has been holden to be good (l). But where a notice was given on the 21st October, 1843, to quit on the 13th May next ensuing, or "on such other day in the current year as the tenancy of the premises you now hold shall expire,"—it was holden bad, for the "current year" must be understood to be the year 1843 (m). Care must be taken also to describe the premises correctly (n). But where they were described as of a wrong parish, the court after verdict, held it to be immaterial, as the defendant did not show that he held any other premises of the lessor of the plaintiff, or that he was misled by the notice (o). And the notice also must be as to the whole of the premises demised; a notice as to part only, will be bad (p). Where a house and land are let together from year to year, to be entered upon at different times, and it does not appear from the terms of the demise from what time the whole is to be taken as let together: it is a question of fact for the jury, whether the house or the land be the prin-

(g) *Doe v. Green*, 9 Ad. & El. 658. *Doe v. Dobell*, 10 Law J. 242, qb. *Doe v. Donovan*, 2 Camp. 78. But see *Doe v. Grafton*, ante, p. 92.

(h) *Doe v. Lea*, 11 East, 312, and see *Johnstone v. Huddleston*, 4 B. & C. 922. *Beasell v. Landsberg*, 14 Law J. 335, qb. *Oakhapple v. Copous*, 4 T. R. 361. *Doe v. Bayley*, 5 Car. & P. 67.

(i) *Doe v. Perrin*, 9 Car. & P.

467. S. P. *Doe v. Vince*, 2 Camp. 256.

(k) *Doe v. Kightley*, 7 T. R. 63.

(l) *Doe v. Buller*, 2 Esp. 589.

(m) *Doe v. Morphet*, 14 Law J. 245, qb., and see *Mills v. Goff*, 14 Law J. 249, ex.

(n) *Doe d. Cox v. —*, 4 Esp. 185.

(o) *Doe v. Wilkinson*, 12 Ad. & El. 743.

(p) *Doe v. Archer*, 14 East, 245. See *Doe v. Church*, 3 Camp. 71.

cipal subject of demise, or accessorial merely, in order that the judge may decide whether the notice to quit the whole were given in time (*q*). The following may be the form of the notice :—

Sir, I hereby [as agent for Mr. John Nokes, your landlord, and on his behalf,] give you notice to quit and deliver up possession of the [house, land, and premises, with the appurtenances] situate at — in the county of —, which you hold of him as tenant thereof, on the [twenty-fifth day of March

next], or at the expiration of the current year of your tenancy, which shall expire next after the end of one half year from the date of this notice. Dated the — day of —, 18—.

James Nokes.

To Mr. Joseph Styles.

Make duplicates of this notice, and compare them carefully. Then serve one of them upon the tenant, personally if you can ; or if you cannot meet with him, you may serve it upon his wife or servant at his dwelling-house, explaining to them at the same time the nature of the notice, and it will be presumed that it came to his hands (*r*). Where a corporation is lessee, the notice may be served on its officers (*s*). Then make a memorandum of the day and manner of service on the other copy, and keep it, in order to be able to prove the service of the notice at the trial.

Care must be taken to serve this notice half a year (that is to say 183 days) at least before the day at which the tenant is to quit the premises (*t*) ; six months, it seems, if they comprise a less number of days, are not sufficient (*u*).

In what cases, and how waived.] If after giving a notice to quit, the landlord distrain for rent due after the expiration of the notice (*v*), or receive such rent (*w*), he thereby waives his notice to quit, and the tenancy continues. In one case, where the landlord brought ejectment, immediately after the expiration of a notice to quit at Michaelmas, and the tenant appeared and pleaded to the action, but at the Christmas following the tenant paid the quarter's rent then due, and the landlord received it : Lord Mansfield and the other judges of the court of Queen's Bench held that this, of itself, was not a waiver of the notice to quit, but that it ought to be left to the

(*q*) *Doe v. Howard*, 11 East, 498, and see *Doe v. Watkins*, 7 East, 551. *Doe v. Ld. Grey de Wilton*, 2 East, 384, n. *Doe v. Spence*, 6 East, 120. *Doe v. Snowden*, 2 W. Bl. 1224. *Doe v. Hughes*, 7 Mees. & W. 139. *Doe v. Rhodes et al.*, 11 Id. 600.

(*r*) See *Jones v. Marsh*, 4 T. R.

464. *Doe v. Lucas*, 5 Esp. 153. *Smith v. Clark*, 9 Dowl. 202.

(*s*) *Doe v. Woodman et al.*, 8 East, 227.

(*t*) *Right v. Darby*, 1 T. R. 159. (*u*) Id. 163.

(*v*) *Zouch v. Willingale*, 1 H. Bl. 311.

(*w*) *Goodright v. Cordrent*, 6 T. R. 219.

jury, with its attendant circumstances, to say whether the parties thereby intended to waive the notice and continue the tenancy (*x*). But in *Goodright v. Cordcent*, above mentioned (*y*), *Ld. Kenyon, C. J.*, said that he could not subscribe to such a doctrine; and the court then decided that if a landlord receive the rent in such a case *quà* rent, it is a waiver of the previous notice to quit, and not merely evidence of intention to go to the jury. But where the rent was usually paid at a banker's, and the banker without any authority received rent after the expiration of a notice to quit: this was holden to be no waiver of the notice (*z*). But a mere demand of subsequent rent, is no waiver of the notice (*a*). So, distraining for, or receiving, rent due before the expiration of a notice to quit, is no waiver of the notice (*b*). So, where the landlord, fearing that a witness, who could prove a notice already given, should die, gave a second notice to quit: it was holden that the giving of the second notice, was no waiver of the first (*c*). So, where a second notice, given after the expiration of a former one, required the tenant to quit on a subsequent day, or to pay double rent: this was holden to be no waiver of the first notice (*d*). But where a notice was given to the lessee to quit at Michaelmas, 1810, and another notice given to the defendant, his assignee, to quit at Michaelmas, 1811, the latter notice was holden to be a waiver of the former one, as far as respected the defendant (*e*). Where the tenant gave a notice to quit, which turned out to be inoperative, but at the end of the year the landlord and he imagining it to be valid, and that it determined the tenancy, entered into a fresh agreement for a tenancy from year to year at a lower rent: this was holden to be a release of the existing term, and a substituting of a new demise at the reduced rent (*f*).

Also, where a landlord of premises, being about to sell them, gave his tenant notice to quit on the 11th of October, 1806, but promised him not to turn him out, unless they should be sold; they were sold in February, 1807, but the tenant then refused to give up possession, and the landlord accordingly brought ejectment: it was holden that the promise was no waiver of the notice to quit, nor did it operate as a licence to be on the premises, otherwise than subject to the landlord's right of acting on such notice if necessary; and therefore

(*x*) *Doe v. Batten*, Cowp. 243.

(*y*) *Ante*, p. 96.

(*z*) *Doe v. Calvert*, 2 Camp. 387.

(*a*) *Blyth v. Dennett*, 22 Law J. 79, cp.

(*b*) *Anon.* 1 T. R. 161, cit.

(*c*) *Doe v. Humphreys*, 2 East, 237.

(*d*) *Messenger v. Armstrong*, 1 T. R. 53. 8. P. *Doe v. Steele*, 3 Camp. 117.

(*e*) *Doe v. Palmer*, 16 East, 53.

(*f*) *Hodges v. Lawrence*, Ex. 18 Shaw's J. P. p. 347.

that the tenant, not having delivered up possession, on demand, after the sale, was a trespasser from the expiration of the notice to quit (*f*).

How proved.] Duplicates are usually made of the notice, and are examined; they are then signed by the landlord, and one served, the other kept, as suggested, *ante*, p. 96. But if there be but one original notice, signed, it will be sufficient; and an examined copy of it may afterwards be given in evidence, without giving the defendant notice to produce the original (*g*); as a notice to produce a notice is never required.

SECTION IV.

Notice to determine a Lease for Years.

The parties to a lease often stipulate in it, that the lessee, or the lessor, or either, may determine the term of years thereby created, by a notice to that effect previously to be given. It depends of course upon the wording of such stipulation or proviso, what construction is to be given to it. Sometimes the *habendum* is for the full term, for instance twenty-one years, with a subsequent proviso that it shall be lawful for the lessee, or for either party, to determine it at the end of the first seven or fourteen years, upon his giving six months previous notice of his intention so to do; sometimes the *habendum* is for seven, fourteen, or twenty-one years, in the alternative. These are in effect the same, the latter being deemed a lease for twenty-one years, determinable at the end of the first seven or fourteen years (*h*). If the option be given to the lessee alone, the lessor of course has no right to determine the tenancy before the end of the longer term. Or if nothing be said in the lease as to which party shall have the option, the lessee alone shall have it (*i*). Where there was a lease of lands for twenty-one years, with a proviso that it should be determinable by the lessee or the lessor at the end of the first seven or fourteen years, but there was a memorandum indorsed upon it, before execution, of its being agreed between the parties that the lessor should not dispossess the lessee, nor cause him to be dispossessed, of the said estate, but

(*f*) *Whiteacre v. Symonds*, 10 East, 13.

(*g*) Per *Ld. Ellenborough*, 2 Camp. 111. Per *Le Blanc, J.*, *Id.* 601. *Doe v. Somerton*, 14 Law J. 210, qb.

(*h*) *Goodright v. Richardson*, 3 T. R. 462.

(*i*) *Dann v. Spurrier*, 3 B. & P. 399, 342. *Doe v. Dixon*, 9 East, 15.

that he might have it for the term of twenty-one years from that time : it was holden that this memorandum did not affect the lessor's option, as given him by the lease, but that he might notwithstanding determine the tenancy at the end of the first seven or fourteen years ; for the memorandum did not operate as a new lease, and a surrender in law of the lease on which it was indorsed (*k*). Where the option is thus given to the lessor, his executors or administrators,—a devisee of the lessor may avail himself of it (*l*). ✓

Sometimes a previous notice is expressly required by the proviso or stipulation, sometimes not. Where such notice is not expressly required, and the premises are let for seven, fourteen, or twenty-one years, or the like,—if the lessee wish to continue the holding, it is not necessary for him to give any notice to the lessor of his intention to do so : but by holding them a day after the first seven years, he sufficiently indicates his intention to hold them for fourteen ; and by holding them a day after the first fourteen years, he sufficiently indicates his intention to hold them for the full term of twenty-one (*m*). But if either party intend to determine the lease at the end of the seven or fourteen years, he must give the other party reasonable notice thereof (*n*). And where notice is expressly required, care must be taken that the terms of the stipulation or proviso in this respect be strictly complied with. Where a house was let for twenty-one years from Michaelmas-day, 1823, with a proviso that if the lessee should be desirous to determine the tenancy at the end of the first seven or fourteen years, and should leave or give six calendar months' notice to the lessor immediately preceding the first seven or fourteen years, the demise should thereupon determine : and on the 1st November, 1836, the lessee gave notice that he would deliver up the premises on the 24th June then next, "agreeable to the covenants in the lease," whereas the fourteen years would not in fact expire until the Michaelmas : the court held the notice to be bad, and that it did not determine the tenancy, although the jury found that the lessor was not deceived or misled by it, but understood it as referring to the last day of the fourteen years (*o*). Where the lease stipulated that the lessee might determine the tenancy by notice, all covenants and agreements upon his part being observed and performed,—it was holden that a performance of all the covenants by the lessee was a condition precedent to his right to determine the lease (*p*). But where there was a lease of several parcels at a

(*k*) *Goodright v. Mark*, 4 M. & S. 30.

(*l*) *Ree v. Hayley*, 12 East, 464.

(*m*) See *Ferguson v. Cornish*, 2 Burr. 1032 ; 3 T. R. 463, n.

(*n*) *Semb. Goodright v. Richardson*, 3 T. R. 462.

(*o*) *Caddy v. Martinuz*, 11 Ad. & El. 720.

(*p*) *Friar v. Grep et al.*, 19 Law J. 368, ex. ; 20 Law J. 365, ex.

rent of 180*l.*, that is to say, for such a parcel so much, and so distributing the rent among the different parcels, for a term of twenty-one years, with liberty to either party to determine it at the end of fourteen years, giving to the other two years' previous notice thereof; and the lessor accordingly gave notice, but instead of naming all the parcels, he merely named the first, and then added an "&c." after it: this was holden to be sufficient (*e*). But a party cannot give notice to determine a lease as to part of the premises demised (*f*), unless the lease expressly give him liberty to do so.

SECTION V.

Forfeiture generally.

Right of entry for a forfeiture, in what cases.] The right of the landlord to enter for a forfeiture of the term by the tenant, is either given by law, without any stipulation upon the subject between the parties, or it is made the matter of express stipulation in the contract under which the tenant occupies the demised premises. If a lessee do any act, by which he disaffirms or impugns the title of his lessor, his lease is thereby forfeited (*g*). If he sue out a writ, or resort to a remedy, which claims or supposes a right in him to the freehold,—or if, in an action against him by the lessor, grounded upon the lease, he resist the demand under a grant of a higher interest in the land,—or if by matter of record he acknowledge the fee to be in a stranger,—he thereby forfeits his lease (*h*). But a mere verbal disclaimer, and declaring, when applied to for an acknowledgment of his tenancy, that the freehold was his own, has been holden not to amount to a forfeiture (*i*). Also, formerly, if he aliened the estate in fee, by any mode of conveyance which had the effect of divesting the estate of the reversioner, such as by feoffment or other common law conveyance, it was a forfeiture of the lease, and the lessor might re-enter (*j*). But a conveyance by lease and release, or other conveyance under the Statute of Uses, had no such effect, for they pass no greater interest than the party may lawfully convey (*k*); nor would an underlease by the tenant for a greater term than he had in the land, have that effect, for such a lease did not affect the interest of the lessor. And now, by stat. 8 & 9 Vict. c. 106, s. 4, a feoffment, made after

(*e*) *Doe v. Archer*, 14 East, 245.

(*f*) *Id.*

(*g*) *Bac. Abr. Lease*, T. 2.

(*h*) *Id.*

(*i*) *Doe v. Wells et al.*, 8 Law J. 265, qb.

(*j*) *Id.*

(*k*) *Id.*

the 1st October, 1845, shall not have any tortious operation.

If a lease be granted upon condition, and the condition be broken, the lessor may enter for the condition broken (*l*).

And if it be stipulated in the lease or agreement under which a tenant holds the demised premises, that if he be guilty of a breach of a particular covenant or stipulation, or generally, of any of the covenants in the lease, or stipulations in the agreement, on his part to be performed or observed, that the landlord may re-enter,—if the tenant be guilty of any such breach, the landlord may accordingly re-enter, or bring his ejectment (*m*). But the stipulation in the lease or agreement which gives this power of re-entry, is generally construed very strictly. Where a lease contained a proviso for re-entry, if the tenant should make default in *performance* of any of the covenants therein, the court held that it extended only to affirmative covenants, and not to negative covenants, for these were not to be performed (*n*). So, where the lessee covenanted to pay the rent, and not to assign without leave of the lessor, and there was a proviso for re-entry, if the rent should be in arrear, or if all or any of the covenants *thereinafter* contained on the part of the lessee should be broken; but there was in fact no covenant on the part of the lessee in the lease, subsequent to the proviso, and merely one by the lessor that upon the lessee paying the rent and performing all and every of the covenants “hereinbefore” contained on his part to be performed, he should quietly enjoy, &c. : the court held that the lessor could not re-enter for breach of the covenant not to assign; for the proviso was restrained by the word “*hereinafter*” to subsequent covenants, and although there were none, the court would not reject the word (*o*). So, a proviso in a lease, giving power of re-entry, if the lessee “shall do or cause to be done any act, matter or thing contrary to and in breach of any of the covenants,” has been holden not to apply to a breach of a covenant to repair, the omission to repair not being an act done within the meaning of the proviso (*p*). But where in a lease of land, there was a covenant amongst others that the tenant should expend upon the premises all the hay, &c., under a penalty of 5*l.* for every ton carried off, and there was a clause for re-entry which enumerated every covenant in the lease except this, and then provided that for breach of any of the covenants in the lease the lessor might re-enter: it was holden that the penalty of 5*l.* did not prevent the general clause of re-entry from applying to this covenant to expend

(*l*) Bac. Abr. “Condition,” O.

(*m*) *Vide infra*.

(*n*) *Doe v. Marchetti*, 1 B. & Ad.

(*o*) *Doe v. Goodwin*, 4 M. & S. 205.

(*p*) *Doe v. Stevens*, 3 B. & Ad. 299.

the hay, &c., upon the land; the words of the proviso being large enough to comprehend it (*r*). And the landlord may maintain ejectment for a forfeiture, in such cases, although he have reserved to himself no reversion by his lease (*s*).

And in all these cases, where the landlord has a right of entry for a condition broken, it is not necessary that an actual entry should be made upon the land; but an ejectment may at once be brought, and the entry confessed by the defendant in the consent rule will be sufficient in this respect (*t*).

By whom.] The lessor may of course re-enter for a forfeiture; so may his heir or executor, respectively, when entitled to the reversion. But at common law an assignee or grantee of a reversion could not enter for a condition broken; for, to prevent maintenance, the common law did not allow of an assignment of a right of entry or re-entry (*u*). If indeed a lease for years were to be void, on the breach of a condition, then the assignee might have advantage of it at common law (*v*). But where a lease for life was with such a condition, or a lease for years with a condition that if such a thing should be done, the lessor might re-enter, there the grantee of the reversion could not enter by the common law (*w*). By stat. 32 Hen. 8, c. 34, however, it is enacted, that all persons, being grantees or assignees to the king, or to any other person, and the heirs, executors, successors, and assigns of every of them, shall and may have and enjoy all and every such like advantages against the lessees, their executors, administrators and assigns, by entry for non-payment of rent, or for doing of waste, or other forfeiture, as the lessors or grantors themselves or their heirs should have had and enjoyed. This was confined to the re-entry for non-payment of rent, for committing waste, or other matter of the same nature, such as a condition to do a thing incident to the reversion, as the payment of rent, or for the benefit of the estate, as by not committing waste (*x*), and did not extend to conditions to do or refrain from collateral acts. But this Act extends, not only to the assignee of a reversion in fee, but also to an assignee for life or years (*y*), being assignee of the whole of the reversion, and not of part merely (*z*).

It is necessary to observe, that in these cases it is entirely optional with the lessor whether he will avail himself of this

(*r*) *Doe v. Jepson et al.*, 3 B. & Ad. 402.

(*s*) *Doe v. Bateman*, 2 B. & A. 168.

(*t*) *Little v. Heaton*, 2 Ld. Raym. 750; 1 Salk. 259. *Anon.* 1 Vent. 248. *Clerke v. Pywell et al.*, 1 Saund. 319. *Oates v. Brydon*, 3 Burr. 1896, 1897. *Goodright v. Cator*, 2 Doug. 477.

(*u*) Co. Lit. 214.

(*v*) Co. Lit. 214. b, 215. a. *Penant's case*, 3 Co. 65 a.

(*w*) Co. Lit. 215. a.

(*x*) Co. Lit. 215. b.

(*y*) Co. Lit. 259.

(*z*) Co. Lit. 215. a. *Dumpon's case*, 4 Co. 120 a, b.; 5 Id. 55.

right of re-entry or not, even although by the terms of the proviso the term is to cease (a), or to become void (b), for the non-performance of the covenants; and if the landlord do not avail himself of it, the term continues as before; the lessee cannot elect that it shall cease or be void.

Waiver of the forfeiture.] An acceptance of rent by the landlord, after a forfeiture, will be a waiver of it, if the landlord knew of the breach of the condition or covenant from which it arose, at the time he received the rent; for the receipt of rent is an admission that the tenancy is then subsisting (c). Therefore, if there be a right of re-entry for non-payment of rent when demanded, and rent be demanded on the day and be not paid, and the lessor afterwards distrain for rent subsequently accruing, he thereby affirms the lease, and admits the continuance of it. And this was formerly the case, where the distress was for the same rent which had been demanded; for the distress admitted that the tenancy was still subsisting (d); but the stat. 8 Ann. c. 14, s. 6, which enables a landlord to distrain at any time within six months after the determination of the tenancy, seems to have altered this. So, where the condition of the re-entry is "if the lessee shall underlet, assign, or transfer the premises or any part thereof, without the consent of the lessor in writing, under his hand and seal," an acceptance by the lessor of rent due after the breach of the condition, with notice of it, is holden to be a waiver of the forfeiture (e). Or if in this last case a parol licence were given (and which would be bad), yet the acceptance of rent afterwards would be a waiver (f). Where the condition of re-entry is, "in case the lessee or his assigns shall assign the premises without licence;" if the lessor license the lessee to assign any part, it is a dispensation of the whole condition, and the lessee or his assignee may assign all the residue without licence (g). But it has been holden that a lessor, who has a right of re-entry on a breach of covenant not to underlet, does not, by waiving his entry on one underletting, waive his right to re-enter on a subsequent underletting; nor, under a covenant to repair, does he, by a waiver on one breach, bar himself of his right of re-entry for a subsequent breach (h). And the same in the case of a forfeiture for not in-

(a) *Arnsby v. Woodward*, 6 B. & C. 519.

(b) *Rede v. Farr*, 6 M. & S. 121.
Doe v. Banks, 4 B. & A. 401.

(c) *Pennant's case*, 3 Co. 64 b, Cro. El. 553, 572. *Harvey v. Oswald*, Moore, 456, 2 Ander. 90.
Arnsby v. Woodward, 6 B. & C. 519.

(d) *Pennant's case*, supra. See *Brewer v. Eaton*, 3 Doug. 290.

(e) *Goodright v. Davids*, Cowp. 803.

(f) *Roe v. Harrison*, 2 T. R. 425, 430.

(g) *Dumport's case*, 4 Co. 119. Cro. El. 815, 816.

(h) *Doe v. Bliss*, 4 Taunt. 735.

uring (*g*). So, if there be a right of re-entry for exercising a certain trade upon the demised premises, the landlord, by merely lying by, and witnessing the act, even for six years, does not waive the forfeiture; there must be some act affirming the tenancy, to have that effect (*h*). And the same in all cases of a continuing breach (*i*). But if in such a case the lessor saw the tenant expend money in improvements with a view to such an occupation, it might be evidence to be left to the jury of his consent to such an alteration of the premises (*k*). Also, after the landlord has actually brought his ejectment for the forfeiture, his receipt of rent will be no forfeiture (*l*).

Mr. Serjeant Williams, in his note upon this subject, in 1 Saund. 287 b, says that in cases of conditions of re-entry, there is a difference between leases for lives and leases for years. In the case of a lease for lives, if the lessee neglect or refuse to pay his rent after a regular demand, or be guilty of any other breach of the condition of re-entry, the lease is thereby voidable only, although the condition express that it shall be thereby actually void; and therefore if the lessor in such a case, after notice of the forfeiture, (which is a material and issuable fact (*m*),) accept rent which accrued due after, or do any act which amounts to a dispensation of the forfeiture, the lease, which was before voidable, is thereby affirmed. But in the case of a lease for years, if there be a condition that it shall be void for non-payment of rent or non-performance of any other covenant, then, if the lessee be guilty of any breach of the condition, the lease is actually void, and cannot be set up by any act of the lessor; and, on the other hand, if the condition be merely that the lessor in such a case may re-enter the lease is voidable only, and may be affirmed by acceptance of rent, &c., if the lessor had notice of the breach at the time (*n*). This distinction, however, is somewhat shaken by a more recent case, where in a lease of certain coal mines it was provided that "if the same shall stop or cease to work at any time two years, this lease shall be deemed void to all intents and purposes:" it was holden, that by the lessee ceasing to work it for two years, the lease did not actually become void, unless the landlord chose to make it so; that by receiving rent afterwards, the landlord did not create a tenancy from year to

(*g*) *Doe v. Gladwin*, 14 Law J. 189, qb.

(*h*) *Doe v. Allen*, 3 Taunt. 78.

(*i*) *Doe v. Woodbridge*, 9 B. & C. 376.

(*k*) *Id.*

(*l*) *Doe v. Meux*, 1 Car. & P. 346.

(*m*) *Pennant's case*, and *Roe v. Harrison*, *ante*, p. 103.

(*n*) *Browning and Beston's case*, Plowd. 133, Co. Lit. 215. a. *Pennant's case*, 3 Co. 64 a, 65 a, b. 1 Saund. 287 b.

year, but the tenant continued to hold under the lease; and that at any time afterwards, if there were a cesser to work for two years, the landlord might at his election make the lease void, and bring his ejectment, without giving a notice to quit (o).

In what cases a court of equity will relieve against a forfeiture, see 1 Maddock Chanc. 36, &c.

Forfeiture in particular Cases.

For non-payment of rent.] The law does not favour forfeiture; which will account for the very strict proof required of a landlord, when he seeks to enforce a forfeiture, and recover the demised premises, by reason of the tenant's non-payment of rent, in a case where there is a sufficient distress upon the premises. But by stat. 15 & 16 Vict. c. 76, s. 210, as often as it shall happen that one half year's rent shall be in arrear, and the landlord to whom the same is due, hath a right by law to re-enter for the non-payment thereof, such landlord shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, —or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord may affix a copy thereof upon the door of the messuage, or upon some notorious place of the lands, demised, and such affixing shall be deemed legal service thereof (p).

For not repairing.] If there be a power of re-entry for non-performance of a covenant to repair, or of the covenants in the lease generally, and one of them be a covenant to repair, and the premises are allowed to go out of repair, the lessor may re-enter, that is, he may bring an ejectment forthwith for the recovery of the demised premises, without any previous notice requiring the tenant to put them in repair, if no such notice be required by the terms of the lease (q). Where there is a general covenant to repair, and also a covenant to repair within three months or other time after notice, the landlord is not bound to wait the three months before he brings ejectment for a forfeiture by reason of a breach of the general covenant (r). But if he give notice, under the second covenant, he

(o) *Doe v. Banks*, 4 B. & A. 401, and see *Arnaby v. Woodward*, *Rede v. Farr*, and *Doe v. Banks*, ante, p. 103.

(p) See post, p. 172.

(q) *Doe v. Morris*, 11 Law J. 313, ex.

(r) *Roe v. Patne*, 2 Camp. 520.

thereby waives the general covenant, and he cannot bring his ejectment until after the three months have expired (*u*).

A forfeiture for not repairing, may be waived, by receiving rent for the demised premises, becoming due after the right of entry accrued (*v*); but not by receiving rent becoming due before the expiration of a notice to repair; nor is it waived, but merely suspended, by allowing the tenant a further time to repair (*w*).

For waste.] Where a right of re-entry is reserved to a lessor, in case his lessee commits waste, it is generally construed to mean such waste as may be injurious to the reversion, and not merely such as might be given in evidence under the old writ of waste, unless there be some stipulation in the lease, &c., to the contrary. And therefore where a lease contained a proviso for re-entry, if the lessee should commit waste to the value of 10s., and the lessee having pulled down some old buildings of more than the value of 10s., and substituted others of a different description, the lessor brought his action of ejectment for the forfeiture: the court held that the waste contemplated by the proviso was waste producing an injury to the reversion; and that it was a question for the jury, under all the circumstances, whether such injury, to the value of 10s., had been committed (*x*).

For not insuring.] Where by a proviso in a lease, the lessor has a right of re-entry for any breach of a covenant to insure the demised premises,—the lessor may bring ejectment as for a forfeiture, if the lessee have not insured, or have failed in payment of the premium.

Where a lessee covenanted that he, his executors and assigns, would insure the demised premises, and keep them insured during the term, and deposit the policy with the lessor: this was holden to mean, not that the lessee should effect any one policy, and keep that particular policy on foot, but that he, his executors and assigns, should always keep the premises insured by one policy or another; but the court held that it would be a breach, if the premises were uninsured at any one time; and that it would be a continuing breach for any length of time they were uninsured (*y*). In this last case, the lease contained a proviso for re-entry, on a breach of any

(*u*) *Doe v. Meux*, 4 B. & C. 606.

(*v*) See *Fryett v. Jeffreys*, 1 Esp. 303.

(*w*) *Doe v. Brindley*, 4 B. & Ad. 84.

(*x*) *Doe v. Bond*, 5 B. & C. 855.

See *Doe v. Price*, 19 Law J. 121, cp.

(*y*) *Doe v. Peck*, 1 B. & Ad. 428.

of the covenants; the lessee had assigned, but the premises were never insured by him or his assignee; and it appeared that the lessor had distrained on the 30th of September for rent then due, and afterwards brought his ejectment as for a forfeiture in not insuring, on a demise laid on the 24th of October: it was holden that he might do so, and was entitled to recover; although the distress was an acknowledgment of a tenancy on the 30th of September, and a waiver of any forfeiture up to that time, yet that the lessor had a right to recover for the forfeiture incurred by the breach of covenant between the 30th of September and the 24th of October (z). Where, upon the production of the lease at the trial, it appeared that the lessee had covenanted to insure in the joint names of the lessor and of himself, and in two-thirds of the value of the demised premises; and it was alleged that he had insured in his own name only, and to a less amount than two-thirds of the value: but it appeared that there were two parts of the lease, both of which were retained by the lessor, and he gave merely an abstract to the lessee, in which no mention was made that the insurance was to be in the joint names; and as to the insurance being under two-thirds of the value, it was effected for the very same sum for which the premises had been previously insured by the lessor himself: Abbot, C. J., held, that as the conduct of the lessor was such as was calculated to induce a reasonable and cautious man to conclude that he was doing all that was necessary or required of him, by insuring in his own name and to the amount insured, he could not recover as for a forfeiture, although there was no dispensation or release of the covenant (a).

For assigning or underletting, &c.] In this, as in all other cases of forfeiture, the covenant or stipulation not to assign or underlet, &c., is construed strictly, in favour of the tenant, and against the forfeiture. A proviso for re-entry, if the lessee shall assign the premises, does not prevent him from making an underlease for part of the term (b); even a proviso not to assign, transfer, set over, or otherwise do or put away the lease or premises, has been holden not to extend to such an underlease (c). But a covenant not to let or assign, comprehends an underlease (d). So, a covenant not to assign or otherwise part with the premises or any part thereof, for the whole or any part of the term, is broken by a grant of an

(z) *Doe v. Peck*, 1 B. & Ad. 428.

(a) *Doe v. Rome*, Ry. & M. 343.

(b) *Kinnersley v. Orpe*, 1 Doug.

85.

(c) *Crusoe v. Bugby*, 2 W. Bl. 706; 3 Wils. 234.

(d) *Roe v. Harrison*, 2 T. R. 425.

underlease (*g*). On the other hand, however, a covenant not to underlet, will restrain an assignment (*h*).

A devise of a term for years to a stranger, is an assignment within the meaning of a covenant not to assign. But a devise, whereby the term vests in the lessee's executor, is not (*i*). And an executor or administrator is bound by such a covenant, if the covenant name him (*k*); but it seems to be doubted whether he is bound, if not named in it (*l*). And the assignment, to amount to a forfeiture, must be valid, or at least only voidable, not void. And therefore, where a lease contained a proviso, that the lessor might re-enter, and that the lease should be void, if the lessee should assign the term; and the lessee, by deed, assigned all his property, real and personal, to trustees for the benefit of his creditors, and was afterwards declared a bankrupt: it was holden that as this assignment was an act of bankruptcy, it did not operate as a valid assignment of the term, and therefore did not amount to a forfeiture (*m*). Also, a mere deposit of the lease with another, as a security for money advanced, is not an assignment within such a covenant (*n*).

A covenant not to underlet the demised premises, is not broken by letting a part of them in lodgings (*o*). But where a lease contained a proviso for re-entry, in case the tenant should demise, lease, grant, or let the demised premises, or any part or parcel thereof, to any person whomsoever, for the whole or any part of the term, without the licence of the lessor in writing; and the lessee, without such licence, agreed with a person to enter into partnership with him, and that he should have the use of a back chamber and some other parts of the premises exclusively, and of the rest jointly with the defendant, and accordingly let him into possession: this was holden to come within the proviso, and that the lessor might re-enter (*p*).

But a covenant not to assign, &c., will not extend to an assignment by act of law, unless that be made the subject of an express stipulation. So that if the lessee become bankrupt, and the term pass to the assignees, it is not an assignment within the meaning of a covenant not to assign (*q*); and his assignees may afterwards assign it without licence (*r*). So, if

(*g*) *Doe v. Worsley*, 1 Camp. 20.

(*h*) *Greenaway v. Adams*, 12 Ves. 395.

(*i*) 4 Bac. Abr. Lease, T.

(*k*) *Roe v. Harrison*, 2 T. R. 425.

(*l*) See *Doe v. Bevan*, 3 M. & S. 353.

Smallpiece v. Evans, 1 And. 124.

More's Case, Cro. El. 26.

(*m*) *Doe v. Powell*, 5 B. & C. 308.

(*n*) *Doe v. Hogg*, 4 D. & R. 226.

1 Car. & P. 160.

(*o*) *Doe v. Laming*, 4 Camp. 77.

(*p*) *Roe v. Sales*, 1 M. & S. 297.

(*q*) *Goring v. Warner*, 7 Vin. Abr. 85, pl. 9.

(*r*) *Doe v. Smith*, 5 Taunt. 795.

Doe v. Bevan, 3 M. & S. 353.

the term be taken in execution, and sold, it is not an assignment within such a covenant, even although the judgment were upon a warrant of attorney (*s*), provided it were not effected in collusion with the creditor, for the purpose in fact and effect of assigning to him, in fraud of the covenant (*t*). But if the lessee voluntarily take the benefit of the Insolvent Act, and the lease be assigned to his assignee, this would be a breach of the covenant, and a forfeiture, because it is in the nature of a voluntary alienation, arising from the voluntary act of the lessee himself (*u*).

For other acts, &c.] A very ordinary covenant on the part of the lessee, in leases of houses, is, that he will not carry on any trade, or any particular trade specified, or allow of the same to be carried on, in the house demised; and if a power of re-entry be reserved in such a case, the lessor may enter as for a forfeiture, upon any trade, strictly within the meaning of the covenant, being carried on in it. Where the covenant was, "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, without the licence of the lessor," &c.; and the lessee, without the licence of the lessor, afterwards assigned the lease to a schoolmaster, who carried on his business of schoolmaster in the house and premises: it was holden that the assignment was a breach of this covenant, and the lessor entitled to re-enter under the ordinary proviso for re-entry for non-performance of covenants (*v*). But where, upon a case from equity, the question was, whether a lessee, by granting an underlease to a person who opened a public-house upon the demised premises, had been guilty of a breach of a covenant and proviso for re-entry in the lease; and the covenant appeared to be, that the lessor would not do any act, matter, or thing upon the demised premises, which might be, grow, or lead to, the damage, annoyance, or disturbance of the lessor or any of his tenants, or to any part of the neighbourhood; and the proviso was, that the plaintiff might re-enter, in case the lessee should permit any person to inhabit the premises, who should carry on certain specified trades or businesses (but not mentioning that of a licensed victualler,) or any other business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the lessor's tenants: the court, after argument, certified that neither the granting of the lease, nor the opening of the public-house upon the premises, were breaches of the covenant or proviso (*w*).

(*s*) *Doe v. Carter*, 8 T. R. 57.

(*t*) *Doe v. Carter*, *Id.* 300.

(*u*) 4 Bac. Abr. Lease, T.

(*v*) *Doe v. Keeling*, 1 M. & S. 95.

(*w*) *Jones v. Thorne*, 1 B. & C.

715.

Where a man was let into possession of a farm, and paid rent, under an agreement for a future lease for fourteen years, which was to contain a covenant (amongst others) against taking successive crops of corn from the land, and a proviso for re-entry for breach of any of the covenants; the lease was not in fact executed: the tenant having taken successive crops of corn from the farm, and which would be a breach of the covenant, if the lease had been executed; the lessor brought an ejectment: and it was holden that he had a right to recover; until the lease should be executed, the tenant held as a yearly tenant, subject to the terms and conditions which by the agreement were to be embodied in the lease, and being guilty of a breach of one of them, the landlord had a right to re-enter (*x*). So, where land is let to a man, upon which he agrees to erect certain buildings within a certain time, with a power of re-entry to the lessor in case he fails to do so, but no lease is to be granted until the buildings shall be completed,—if he fail in erecting the buildings within the time, the landlord may maintain ejectment to recover the premises (*y*).

A proviso for re-entry, in case the tenant shall commit an act of bankruptcy, whereon a fiat shall issue, is good in law, although it have the effect of preventing the interest in the term from passing to the assignees (*z*). So, a proviso for re-entry, in case the term shall be taken in execution upon any judgment against the tenant, is good in law, although it have the effect of defeating the execution. And where a lease contained such a clause of re-entry, and before the end of the term the sheriff entered the premises under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seized the tenant's interest in the premises into the king's hands: it was holden, that this was a taking in execution within this clause of re-entry, and that the term was thereby forfeited to the lessor (*a*). And the landlord in such a case is entitled to the emblements (*b*).

(*x*) *Doe v. Amey*, 12 Ad. & El. 476.

(*y*) See *Oldershaw v. Holt et al.*, 12 Ad. & El. 590. *Doe v. Ekins*, Ry. & M. 29. *Doe v. Birch*, 1 Mees. & W. 402.

(*z*) *Roe v. Galliers*, 2 T. R. 133.

(*a*) *Rex v. Topping*, M'Clel. & Y.

544.

(*b*) *Davis et al. v. Eyton*, 7 Bing. 154.

PART II.

THE LANDLORD'S REMEDIES AGAINST HIS TENANT.

CHAPTER I. *For Rent.*

- SECT. 1. *By Distress.*
2. *By Action of Debt.*
3. *By Action of Covenant.*
4. *By Action for Use and Occupation.*
5. *By Ejectment.*
6. *Apportionment of Rent.*

CHAPTER II. *For other Breaches of Contract.*

- SECT. 1. *Breach of Covenant, express or implied.*
1. *By Action of Covenant.*
2. *By Ejectment for a Forfeiture.*
2. *Breach of Contract not under Seal.*

CHAPTER III. *For Waste.*

- SECT. 1. *By Action on the Case in the nature of Waste.*
2. *By Bill in Equity for an Injunction.*

CHAPTER IV. *For holding over after the Expiration of Tenancy.*

- SECT. 1. *By Action for Double Value.*
2. *By Action for Double Rent.*
3. *By Ejectment.*
4. *By Action for Mesne Profits.*

CHAPTER I.

The Landlord's Remedies for Rent.

SECTION I.

Distress.

1. *The Distress.*
2. *Fraudulent Removal of Goods to avoid a Distress.*
3. *Pound breach and Rescue.*

The Distress.

In what cases.] In all cases of a demise of corporeal hereditaments, where a rent certain is reserved, and made payable

at a time certain, if such rent be in arrear, the party legally entitled to it may distrain for it. It is a remedy given by the common law, independently of all stipulation upon the subject between the parties (*a*).

To entitle a landlord to distrain, there must be a demise, express or implied. If the tenant be let into possession under an agreement for a lease at a certain rent, and there is no stipulation in the agreement that in case a lease be not executed the tenant shall hold for one year certain, and no rent be in fact paid: the landlord cannot distrain for any rent during the first year; for here is no demise, express or implied, and the occupier is merely tenant at will (*b*). But as soon as, by payment of rent or otherwise, a tenancy from year to year can be implied (*c*), the landlord may distrain for all rent subsequently accruing. Even where the tenant entered a farm, under an oral agreement for a lease for ten years, by which the time for payment of the rent was fixed, but the amount of the rent was not; no lease was in fact executed, but the tenant occupied according to the terms of the intended lease, and paid a certain rent for two years: it was holden that the landlord might distrain for the like rent subsequently becoming due (*d*). And the demise must be subsisting, at the time the rent is alleged to be due. Therefore, where a landlord gives his tenant from year to year notice to quit, and the tenant holds over after the notice has expired, the landlord cannot distrain for rent alleged to be due for the time the tenant holds over, without some evidence of the renewal of the tenancy (*e*). So, a termor, who has underlet, cannot distrain for rent accruing after his own term has expired (*f*). So, where a lease is surrendered, no distress can be made for any rent alleged to have accrued after the surrender, unless a new tenancy have been created (*g*). But for rent which accrued before, the landlord may distrain (*h*).

It must be a demise of corporeal hereditaments; for no distress can be made for a payment in the nature of rent reserved upon a demise of incorporeal hereditaments, such as a right of common (*i*), tithes (*j*), or the like (*k*). But a landlord may

(*a*) Bro. Abr. Distress, 5, 15. 8 H. 4, 15. Lit. s. 214. Co. Lit. 142. a.

(*b*) *Hegan v. Johnson*, 2 Taunt. 148. *Dunk v. Hunter*, 5 B. & A. 322; and see *Regnart v. Porter*, 7 Bing. 451. *Meckelan v. Wallace*, 7 Ad. & El. 54. n.

(*c*) See *ante*, pp. 68, 69.

(*d*) *Knight v. Bennett*, 3 Bing. 361.

(*e*) *Jenner v. Clegg*, 1 Moody & R. 213. *Sullivan v. Bishop*, 2 Car. & P. 359.

(*f*) *Burne v. Richardson*, 4 Taunt. 720.

(*g*) See *Smith v. Mapleback*, 1 T. R. 441.

(*h*) 8 Ann. c. 14. s. 6.

(*i*) Co. Lit. 47. a, 142. a.; 2 Ro. Abr. 446.

(*j*) Cro. Jac. 111, 173. 2 Ro. Abr. 446, 451. Bro. Abr. Distress, 67, 80. 5 Co. 5.

(*k*) See *ante*, p. 32.

distrain for the rent of ready-furnished lodgings (*l*), for the rent is holden to issue out of the reality alone.

And the demise must be at a specific rent; for unless a fixed rent be agreed upon, the landlord cannot distrain (*m*). Where, however, a tenant entered into possession, under an agreement for a lease, which did not ascertain the amount of rent which was to be paid, nor was the lease ever executed; but the tenant in fact paid a certain rent to his landlord for the premises for two years: it was holden that the landlord might distrain for rent subsequently accruing (*n*); for the tenant paying, and the landlord receiving, a rent certain, were facts from which the law implied a demise from year to year.

And the rent must be payable at a time certain, otherwise it cannot be distrained for; indeed the lease in such a case would be void (*o*). If the *reddendum* in the lease specify the days of payment, the time of payment must be computed from it; but if the *reddendum* be general,—yielding and paying quarterly so much rent,—the time of payment is in that case deemed to be regulated by the *habendum* (*p*). If no time of payment be expressly mentioned, the rent is deemed to be payable yearly, on the anniversary of the day on which the tenancy commenced. As to the day when the rent is said to be due, see more particularly *ante*, p. 33. Where rent was reserved quarterly, or half quarterly if required, and the landlord received it quarterly for a twelvemonth, the court held that he could not, without previous notice, distrain for a half quarter's rent (*q*). But if the rent is to be paid in advance (*r*), or if an increased rent is to be paid for converting meadow into tillage (*s*), or selling hay off the premises (*t*), or the like, it may be distrained for. So, a landlord may distrain for double rent for holding over (*u*), but not for double value, without some evidence of a renewal of the tenancy (*v*).

So, to enable a landlord to distrain, as of common right, he must have reserved to himself a reversion, after the term created by the demise (*w*). But it is immaterial whether that reversion be for years, or for life, or for a higher estate. If a

(*l*) *Newman v. Anderton*, 2 New Rep. 224.

(*m*) Per Abbott, C. J., in *Dunk v. Hunter*, 5 B. & A. 325. Co. Lit. 96. a.; and see *ante*, p. 32.

(*n*) *Knight v. Bennett*, 3 Bing. 361.

(*o*) *Anon.* 1 Mod. 180. Bac. Abr. Lease, 1.

(*p*) *Tomkins v. Pinsent*, 1 Salk. 141.

(*q*) *Mallam v. Arden*, 10 Bing. 299.

(*r*) *Harrison v. Barry*, 7 Price, 690. See *Buckley v. Taylor*, 2 T. R. 600.

(*s*) *Roulston v. Clarke*, 2 H. Bl. 503.

(*t*) *Pollitt v. Forest et al.*, 16 Law J. 424, qb.

(*u*) See *Johnstone v. Huddleston*, 4 B. & C. 922.

(*v*) *Jenner v. Ulegg*, 1 Moody & R. 213. *Sullivan v. Bishop*, 2 Car. & P. 359. See *post*, pp. 216, 211.

(*w*) Co. Lit. 47. a. 5 Co. 3. Bro. Abr. Distress 7, Dett. 39. Latch,

lessee underlet, even although he be merely tenant from year to year, he may distrain upon his under-tenant from year to year, for rent in arrear (*x*); but if, instead of underletting, he assign his term, he cannot distrain upon his assignee for rent reserved by the assignment (*y*), unless by some express stipulation in the assignment he be authorized to do so (*z*).

Where the landlord has a right to distrain, the fact of the tenant having given him his promissory note for or on account of the rent, is no extinguishment of the landlord's right to distrain (*a*). Nor does it even operate as a suspension of the right, unless there be a distinct agreement between the parties that it should do so (*b*). Nor does an agreement by the landlord to accept interest on rent in arrear, prevent his distraining for it (*c*). Nor is the landlord's remedy by distress extinguished by the tenant's taking the benefit of the Insolvent Act, although he be named a creditor for the rent in the schedule (*d*). But where the tenant of a farm, with the privity of his landlord, let the eatage of some pasture to J. S., the price of which was to be paid to the landlord on account of his rent, it was holden that a contract might be inferred from this, on the part of the landlord, that he would not distrain the cattle put upon the land by J. S. for the purpose of consuming the eatage (*e*).

By whom.] The lessor may distrain for rent due to him, if he have not assigned his reversion. And the lessee cannot dispute his right to distrain, if the rent be due and unpaid. But if he have parted with his reversion, he can neither distrain upon the assignee (*f*), nor upon the original lessee. It has been holden, however, that if a tenant from year to year underlet to another from year to year, this is not a parting with the whole of his interest, but that he still has a reversion which enables him to distrain (*g*). So, if tenant for life make a lease for any number of years, no matter how improbable it may be that his life should so long last, he is still deemed to

211. Cro. Jac. 487. Freem. 228.
1 Str. 405.

(*x*) *Curtis v. Wheeler*, Moody & M. 493.

(*y*) — *v. Cooper*, 2 Wils. 375.
Preece v. Corrie, 5 Bing. 24. *Parmenter v. Webber*, 2 Moore, 656.

(*z*) See Co. Lit. 143. *Jewell's case*, 2 Saund. 303.

(*a*) *Harris v. Shipway*, Bul. N. P. 182. *Ewer v. Lady Clifton*, Id. *Davies v. Gyde*, 2 Ad. & El. 623. See *Parrott et al. v. Anderson*, 21 Law J. 291, ex.

(*b*) *Davies v. Gyde*, supra.

(*c*) *Sherry v. Preston*, 2 Chit. 245.

(*d*) *Phillips v. Shervill*, 14 Law J. 144, qb.

(*e*) *Horsford v. Webster*, 1 Cr. M. & R. 696; and see *Welsh v. Rose*, 6 Bing. 638.

(*f*) — *v. Cooper*, 2 Wils. 375. *Parmenter v. Webber*, 2 Moore, 656. *Preece v. Corrie*, 5 Bing. 24.

(*g*) *Curtis v. Wheeler*, Moody & M. 493.

have a reversion in the demised premises, and may distrain for rent in arrear. So where J. S., tenant in fee, leased premises to B. for sixty-one years, and afterwards leased the same premises to C. for a term of years, to take effect from the expiration of the lease to B.; and it was argued that he thereby granted away the reversion immediately expectant upon the first lease, so that he could no longer distrain for rent in arrear due from B.: the court held clearly that the lease to C. was no assignment of the reversion, but that reversion still remained in J. S., and he might distrain for rent due under the first lease (*h*). But where, by a deed of settlement, a mortgage term of 1,000 years was created and vested in trustees, and the lands were settled upon J. S. for life, with a power for leasing for ten years, or for seven years to commence from his death; and he accordingly leased for seven years, to commence from his death, reserving rent to the person who should be entitled for the time being to the freehold and inheritance: it was holden that the trustees of the term or their assignee were the persons entitled to distrain for the rent (*i*).

If the lessor have assigned his reversion, the assignee may distrain for rent in arrear. The privity of contract, which subsisted between the lessor and lessee, is transferred from the lessor to his assignee by stat. 32 H. 8, c. 34, and the assignee has the same remedy for rent that the lessor had. Formerly there must have been attornment also; but that, we have seen (*k*), has been rendered unnecessary, by stat. 4 & 5 Ann. c. 16, s. 9.

And the mortgagee of the reversion, being an assignee, may in like manner distrain on all those who were tenants to the mortgagor of the premises mortgaged at the time of the mortgage. And if he give notice of his mortgage to such a tenant, he is entitled to distrain, not only for rent accruing after such notice, but for all rent which may then be due and owing from such tenant, and which became due subsequently to the mortgage (*l*). But if after the mortgage, the mortgagor take upon himself to let the mortgaged premises to a tenant, the mortgagee's merely giving notice of his mortgage to the tenant, and requiring the tenant to pay his rent to him, has no effect; it does not create the relation of landlord and tenant between the mortgagee and the tenant, nor put the former in a situation to distrain upon the latter for rent in arrear (*m*). If indeed the tenant choose to pay the rent to the mortgagee, and the mortgagee receive it, that will have

(*h*) *Smith v. Day*, 2 Mees. & W. 684.

(*i*) *Rogers v. Humphreys*, 4 Ad. & El. 290.

(*k*) *Ante*, p. 80.

(*l*) *Moss v. Gallimore*, 1 Doug. 279.

(*m*) *Keane v. Elliott et al.*, 9 Ad. & El. 342.

the effect of creating a tenancy from year to year between them (*d*); but even in that case it amounts to an admission merely of a tenancy then subsisting, but will not warrant the mortgagee in distraining for any rent previously owing (*e*). Where a mortgagor attorned and became tenant to the mortgagee at a rent equal to the interest, it was holden that the mortgagee might distrain (*f*).

A tenant by elegit may distrain, although the tenant distrained upon have not attorned (*g*).

If the lessor die, the person who in law is entitled to his reversion, may distrain for rent subsequently accruing; his executor or administrator, for that which was due and owing in his lifetime (*h*). Formerly there was a doubt whether the statute, 32 H. 8, c. 37, now cited, which mentions merely tenants in fee, &c. of rents, extended to cases where the deceased was tenant in fee of land, and demised it for a term of years (*i*). But the point is now put beyond a doubt, by stat. 3 & 4 W. 4, c. 42, s. 37, which enacts that "it shall be lawful for the executors or administrators of any lessor or landlord, to distrain upon the lands demised for any term or at will, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime." As to the rent accruing due after the death, if the lessor had but a term for years in the demised premises, his executor or administrator may distrain for it; if he were seised in fee, his heir is the person to distrain for the rent; or if the lessor have devised the premises, the devisee alone can distrain (*k*).

So where a husband is seised of the reversion of the demised premises, in right of his wife, and the wife dies,—the husband may distrain for any arrears of rent due in the lifetime of the wife (*l*).

If the lessors be joint tenants, all must join in the distress (*m*); but any one of them may distrain in the names of all (*n*). So parceners, as in law they constitute but one heir, must join in the distress (*o*); but in that case also, one may distrain in the names of all (*p*). But tenants in common, as they have several titles, may distrain severally, each for his

(*d*) *Rogers v. Humphreys*, 4 Ad. & El. 299.

(*e*) *Evans v. Elliott*, supra.

(*f*) *West et al. v. Fritch et al.*, 18 Law J. 50, ex.

(*g*) *Lloyd v. Davies*, 18 Law J. 80, ex.

(*h*) 32 H. 8, c. 37, s. 1. Co. Lit. 162. a. (n. 4), 162. b. (n. 1). *Hool v. Bell*, 1 Ld. Raym. 172. *Lambert v. Austin*, Cro. El. 332. *Powell v. Killick*, Bul. N. P. 57.

(*i*) See *Prescott v. Boucher*, 3 B.

& Ad. 849. *Jones v. Jones*, Id. 967.

(*k*) See *Ishernwood v. Oldknow*, 3 M. & S. 382.

(*l*) 32 H. 8, c. 37, s. 3.

(*m*) See 5 Mod. 73.

(*n*) *Robinson v. Hoffman*, 4 Bing. 562.

(*o*) See 5 Mod. 141. 1 Ld. Raym. 64. Skin. 596. Carth. 364.

(*p*) *Leigh v. Shepherd*, 2 Brod. & B. 465. See 1 Salk. 390. Carth. 364.

own share of the rent (*q*); or one may distrain in the names of all, if not forbidden by the others to do so, and may afterwards in replevin avow as to his own moiety, and make cognizance as bailiff for his co-tenants as to their proportions of the rent (*r*). But if a tenant, holding under two tenants in common, pay the whole of his rent to one, after notice from the other not to pay his moiety to any person but himself, the latter may distrain upon the tenant for his share of the rent (*s*). And what is here said as to lessors, who are joint-tenants, &c., applies equally to cases where the assignees or other owners of the reversion are joint-tenants, &c (*t*).

Against whom.] The distress may be levied of the goods of the occupier of the premises, whoever that may be, whether lessee, assignee of the term, or even an under-lessee. Or if the executor or administrator of a deceased lessee remain in possession, as in law he is deemed an assignee of the term (*u*), he may be distrained upon, not only for rent due subsequently to the death, but for rent due before it (*v*).

But where a landlord treated an occupier of his land as a trespasser, by serving him with an ejectment, it was holden that he could not afterwards distrain upon him for rent, even although the ejectment were in fact directed against the claim of a third party, who came in and defended instead of the occupier, and although the latter were aware of the circumstance, and was not turned out of possession (*w*). So where a party, having merely a defeasible title, demised to a tenant for years, who, before the end of the first quarter, was evicted by a party having title paramount to that of the defendant, and remained out of possession about six weeks; he then entered into a new agreement with the party who evicted him, and took possession of the premises under the new tenancy: it was holden that the first landlord could not afterwards distrain upon him, and that in replevin he might give the eviction in evidence under the plea of non-tenuit (*x*). So, if a lessee underlet to another, he cannot distrain for rent accruing due after his own term has expired (*y*).

When.] The tenant has the whole of the day on which the

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| (<i>q</i>) <i>Whitley v. Roberts</i> , 4 McL. & Y. 107. <i>Willis v. Fletcher</i> , Cro. El. 530. | <i>Woollaston et al. v. Hakerill</i> , 10 Law J. 303, cp. |
| (<i>r</i>) See <i>Cully v. Spearman</i> , 2 H. Bl. 386. | (<i>v</i>) <i>Braithwaite v. Cooksey</i> , 1 H. Bl. 463. |
| (<i>s</i>) <i>Harrison v. Barnby</i> , 5 T. R. 246. | (<i>w</i>) <i>Bridges v. Smith</i> , 5 Bing. 410. |
| (<i>t</i>) See <i>Rivis v. Watson</i> , 5 Mees. & W. 255. | (<i>x</i>) <i>Hopcraft v. Keys</i> , 9 Bing. 613. And see <i>Neave v. Moss</i> , 1 Bing. 360. |
| (<i>u</i>) <i>Tilney v. Norris</i> , Carth. 319. | (<i>y</i>) <i>Burne v. Richardson</i> , 4 Taunt. 720. |

rent is made payable, up to twelve o'clock at night, given him, to pay it; and he cannot be distrained upon until the day after (z). So, if it be payable at some feast day "or within twenty-one days after," the lessee has until the end of the last of these days to pay the rent (a). This extension of the time beyond the feast day, however, is not usual in the *reddendum*, although very usual in the proviso for re-entry for non-payment of rent; but its being in the latter only, would not affect the right to distrain, immediately upon the expiration of the time at which the rent is made payable by the *reddendum*.

Formerly a landlord could not distrain, after the expiration of the term; he had then no remedy for his rent but by action (b). And therefore, if the rent were payable at Lady-day and Michaelmas, and the term expired at Michaelmas, the landlord could not distrain for the last Michaelmas rent; for as by law he could not distrain until the day after the rent was due, he would then be too late, as the term was no longer subsisting (c). So, if there were a lease for life, and the *cestui que vie* died, the lessor could not afterwards distrain for rent due before the death (d). But by stat. 8 Ann, c. 14, s. 6, reciting this, it was enacted that it should be lawful for any person, having any rent in arrear or due upon any lease for life or lives, or for years or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done if such lease had not been ended or determined: Provided, by sect. 7, that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due. To bring a case within this statute, the landlord's title or interest must be subsisting, at the time of the making of the distress (e). And therefore where a tenant underlet and his own term expired, it was holden that he could not afterwards distrain upon his under-tenant for rent in arrear (f). So, where the landlord assigned his interest, it was holden that he could not afterwards distrain for rent due to him at the time of the assignment (g). So, to bring a case within this statute, it must appear that the tenant still re-

(z) Per Hale, C. B. in *Duppa v. Mayo*, 1 Saund. 287.

(a) *Clun's Case*, 10 Co. 127.

(b) *Williams v. Stiven*, 15 Law J. 321, qb.

(c) Co. Lit. 47. b. Bro. Abr. Distress, 19. 1 Ro. Abr. 672, pl. 8.

(d) 14 H. 4, 31. 23 H. 7, 96. 6 Co. 64. Co. Lit. 47. Cro. Jac. 442.

2 Bac. Abr. Distress, A. But see stat. 32 H. 8, c. 37, s. 4.

(e) *Drew v. Avery et al.*, 14 Law J. 65, ex.

(f) *Burne v. Richardson*, 4 Taunt. 720.

(g) *Staveley v. Alcock et al.*, 20 Law J. 320, qb.

mained in possession at the time of the making of the distress. And therefore where the tenant, at the expiration of his term, gave up possession of the premises to the incoming tenant, but, without the latter's permission, left some of his cattle in the fold yard, which were distrained upon, whilst there, by the landlord, for arrears of rent due by the owner: it was holden that the landlord could not lawfully do so, as the owner of the cattle was no longer in possession, his merely having them in the fold-yard, not constituting a possession of the farm, &c., within the above statute (*h*). But it is not necessary, within the meaning of the statute, that the possession or holding over should be tortious, or should be of the whole of the premises demised. And therefore where the landlord allowed the tenant, after his term expired, to remain in possession of part of the demised premises, it was holden that the landlord might distrain on that part, within six calendar months after the end of the term, for rent due for the whole of the premises (*i*). And the distress must appear to have been made within six calendar months after the termination of the lease. But if there be a custom of the country that the tenant may reap his away-going crop, and may leave it in the barns, &c., of the farm, for a certain time after the lease has expired, and the tenant has relinquished the possession of the farm generally,—the landlord may still distrain the corn so left, even although the distress be not made until after six months from the determination of the lease (*k*). And the landlord, in such a case, may distrain corn in a stack, although the tenant at the time be restrained by injunction from removing such corn (*l*).

So, where the executors or administrators of a lessor or landlord distrain upon lands let for any term or at will, for rent due to the lessor or landlord in his lifetime,—such distress may be made after the end or determination of such term or lease at will, in the same manner as if such term or lease at will had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due: provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent, shall be applicable to the distresses so made as aforesaid (*m*).

Lastly, the distress must be made within six years from the time when the rent became payable; for by stat. 3 & 4 W. 4,

(*h*) *Taylorson v. Peters*, 7 Ad. & El. 110.

(*i*) *Nuttall v. Staunton*, 4 B. & C. 51.

(*k*) *Heaven v. Delahay et al.*, 1

H. Bl. 5. *Boraston v. Green*, 16 East, 71.

(*l*) *Knight v. Bennett*, 3 Bing. 304.

(*m*) 3 & 4 W. 4, c. 42, s. 38.

c. 27, s. 42, no arrears of rent, or any damages in respect of such arrears, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due,—or next after an acknowledgment of the same, in writing, shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent.

Where.] A distress for rent must be made upon some part of the demised premises; otherwise the tenant may either rescue the distress, or bring an action of trespass (a). Even where in trespass for entering the plaintiff's house and taking his goods, the defendant justified that he let the house to the plaintiff for a term at a certain rent, and that he let a stable to him for another term at a certain other rent, and that there being rent in arrear on both demises, he distrained the goods in the house for the rent of both premises: this justification was holden bad; for these being separate demises, there ought to have been a separate distress on the house, and another on the stable, and that no distress on one part could be good for both rents (b). Where a warehouse was built on some piles on the margin of the river Thames, and two barges in the river, lying near to the piles, were attached to two of them by ropes; rent being due for the warehouse and the wharf in front of it, the landlord distrained these two barges for it; and the court of Common Pleas held that he might, for they were as much upon the premises demised as the nature of the thing would admit of (c). But in a subsequent case in the court of King's Bench, between nearly the same parties, but whether relating to the same premises or not does not appear, it was stated in a special verdict, that one Brown by indenture demised to two persons named Jones, who had become bankrupt, and of whom Buzzard and others were the assignees, all that wharf next the river Thames, described by abuttals, together with all ways, paths, passages, easements, profits, commodities and appurtenances whatsoever to the said wharf belonging, and that by the indenture the exclusive use of the land of the bed of the river Thames opposite to and in front of the wharf, between high and low water-mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land itself between high and low water-mark was not demised; and that two barges, the property of these assignees, lying in this space between high and low water-mark, and attached to the wharf

(a) Co. Lit. 161. a. 2 Inst. 131.
2 Ro. Abr. 671.

(c) *Buzzard et al. v. Capel*, 4 Bing. 137.

(b) *Rogers v. Birkmire*, 2 Str. 1040. Ca. temp. Hardw. 245.

by ropes, were distrained by the landlord for rent due by the bankrupts for the demised premises: the court held that they could not legally be distrained; the meaning of this finding either was, that the part of the bed of the river between high and low water-mark was demised as appurtenant to the wharf, and then it would be a finding that one piece of ground was appurtenant to another, which in law could not be, or that the mere use of the land passed by the indenture, which was a mere privilege or easement, out of which rent could not issue; and in either sense the landlord could not distrain these barges (*d*).

There are three exceptions, however, to this rule:—

1. By stat. 11 G. 2, c. 19, s. 8, it is enacted, that every lessor or landlord, or his steward, bailiff, receiver, or other person empowered by him, may take and seize, as a distress for arrears of rent, any cattle or stock of their respective tenant or tenants feeding or depasturing upon any common appendant or appurtenant or any ways belonging to all or any part of the premises demised or holden.

2. By the same statute, s. 1, it is enacted, that in case any tenant or lessee for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away or carry off or from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable, it shall and may be lawful to and for every landlord or lessor, or any person by him for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels wherever the same shall be found, as a distress for the said arrears of rent, and the same to sell or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords, in and upon such premises, for such arrears of rent: provided, by sect. 2, that no landlord or lessor, or other person entitled to such arrears of rent, shall take or seize any such goods or chattels as a distress for the same, which shall be sold *bonâ fide* and for a valuable consideration before such seizure made, to any person or persons not privy to such fraud as aforesaid. As to the construction given to this and the other sections of this statute, see *post*, p. 139, &c.

3. That if a landlord, coming to distrain, see the cattle on the demised premises, and the tenant, to prevent the distress,

(*d*) *Buzzard et al. v. Capel et al.* *Capel et al. v. Buzzard et al.*, 6 *Bl. & C.* 141, affirmed on error, *Bl. & C.* 150.

drive them from off the premises, the landlord may make fresh pursuit after them, and distrain them; but if the landlord did not see the cattle on the premises, he could not at common law distrain them; nor can he now distrain them, if, after he has seen them, they go off the premises of their own accord (e).

What goods.] All personal goods upon the premises, as well the goods of strangers, as of the tenant, may be distrained; but not things fixed to the freehold (f); not even fixtures, such as kitchen ranges, stoves, coppers, grates, &c., which the tenant may remove (g); nor trees growing, although in a nurseryman's ground, and removable by him from time to time (h); nor beasts of the plough, if there be any other distress upon the premises (i); nor wearing-apparel, if it be in actual use at the time; but if not in actual use, it may (k); nor any perishable article, such as the flesh of animals, which cannot be restored in the same condition within a reasonable time (l). Goods not belonging to the tenant, which may happen to be upon the demised premises for the purposes of trade, cannot be distrained:—such as materials delivered to a weaver to weave (m); goods in the possession of a factor or commission agent for sale (n), or in the warehouse of a wharfinger (o), or granary keeper (p), for safe keeping; goods deposited on the premises of an auctioneer for sale (q); goods brought to a weighing engine to weigh (r); goods given to a carrier to carry (s); a bullock sent to a butcher's to be slaughtered (t); a horse in a smith's shop to be shod (u), or sacks of corn in a mill to be ground (v), and the like. But machinery upon the premises, although belonging to another, and lent to the tenant for the purpose of working for the

(e) Co. Lit. 161. a. 2 Inst. 131. 1 Ro. Abr. 671. 44 E. 3, 20. 4 Leon, 218.

(f) *Dalton v. Whitem et al.*, 12 Law J. 55, qb. *Simpson v. Hartopp*, Willes, 515, per Willes, C. J.; and see *Hellawell v. Eastwood et al.*, 20 Law J. 154, ex.

(g) *Darby v. Harris et al.*, 1 Q. B. 895, 10 Law J. 294, qb.; and see *Niblett v. Smith*, 4 T. R. 504. *Duck v. Braddyll*, 13 Price, 459. *Freeman v. Rosher*, 18 Law J. 340, qb.

(h) *Clark v. Calvert*, 3 Moore, 96. *Clark v. Gaskarth*, 8 Taunt. 431.

(i) 51 H. 3, st. 4; see *Jenner v. Yolland*, 6 Price, 5. *Piggott v. Birtles*, 1 Mees. & W. 441.

(k) *Bissett v. Coldwell*, Peake, 36. *Baynes v. Smith*, 1 Esp. 206.

(l) *Morley v. Pincombe*, 18 Law J. 272, ex.

(m) *Wood v. Clarke*, 1 Cr. & J. 484. *Gibson v. Ireson et al.*, 3 Q. B. 39.

(n) *Gilman v. Elton*, 3 Brod. & B. 75. *Findon v. M'Laren*, 14 Law J. 183, qb.

(o) *Thompson v. Mashiter*, 1 Bing. 383.

(p) *Mathias v. Mesnard*, 2 Car. & P. 353.

(q) *Adams v. Grane*, 1 Cr. & M. 380. *Brown v. Arundell*, 20 Law J. 30, cp. *Williams v. Holmes et al.*, 22 Law J. 283, ex.

(r) Cro. El. 549, 3 Lev. 261.

(s) Salk. 249, 250.

(t) *Brown v. Shevill*, 2 Ad. & El. 138.

(u) 2 Bac. Abr. Distress, B.

(v) Id.

owner (*w*), or let to him for his own purposes (*x*), or the tenant's implements of trade (*y*), even a threshing machine (*z*), if not in actual use at the time, and there be no other sufficient distress upon the premises, may be distrained. So, a brewer's casks sent to a public-house with beer, may be distrained (*a*). So may a carriage or horse standing at livery (*b*), or horses in a stable, which has been let by the tenant to an innkeeper during races (*c*).

It has been stated (*d*) as a general rule, that things fixed to the freehold cannot be taken as a distress for rent. There is one exception, however, to this: By stat. 11 G. 2, c. 19, s. 8, every lessor or landlord, or his steward, bailiff, receiver, or other person empowered by him, may take and seize, as a distress for rent, all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever which shall be growing on any part of the estates so demised or holden, as a distress for arrears of rent, and the same to cut, gather, make, cure, carry, and lay up, when ripe, in the barns or other proper place on the premises so demised or holden; and in case there shall be no barn or proper place on the premises so demised or holden, then in any other barn or proper place which such lessor or landlord shall hire or otherwise procure for that purpose, and as near as may be to the premises, and in convenient time to appraise, sell, or otherwise dispose of the same towards satisfaction of the rent for which such distress shall have been taken, and of the charges of such distress, appraisement, and sale, in the same manner as other goods and chattels may be seized, distrained, and disposed of, and the appraisement thereof to be taken when cut, gathered, cured, and made, and not before. Where the landlord sold the crop whilst growing, instead of waiting until it was cut, and the tenant brought an action against him, it was holden that as the crop was sold at the full price it would have brought if sold at the proper time, and as the rent due exceeded the sum realized from the sale, the tenant was entitled to nominal damages only (*e*).

And formerly, even sheaves and stacks of corn, or corn loose or in the straw, or hay in any barn or granary, or on any hovel, stack or rick, could not be distrained. But by stat. 2 W. & M. sess. 1. c. 5, s. 3, reciting this, it was enacted that it shall be

(*w*) *Wood v. Clark*, 1 Cr. & J. 484.

(*x*) *Fenton v. Logan*, 9 Bing. 670.

(*y*) *Gorton v. Falkner*, 4 T. R. 505. *Roberts v. Jackson*, Peake, Add. Ca. 30.

(*z*) *Fenton v. Logan*, 9 Bing. 670.

(*a*) *Joule v. Jackson*, 7 Mees. & W. 450.

(*b*) *Francis v. Wyatt*, 3 Burr. 1408. 1 W. Bl. 483. *Parsons v. Gingall*, and *Lewis v. Gingall*, 16 Law J. 227, cp.

(*c*) *Crosier v. Tomkinson*, 2 Ld. Ken. 439.

(*d*) *Ante*, p. 122.

(*e*) *Proudlove v. Tremlow*, 1 Cr. & M. 326.

lawful for any person, having rent arrear and due upon any demise, lease, or contract, to seize and secure any sheaves or cocks of corn or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land or ground charged with such rent, and to lock up or detain the same in the place where the same shall be found, for or in the nature of a distress, until the same shall be replevied; and in default of replevying the same [within five days next after the distress taken (*z*)], to sell the same, after such appraisement thereof to be made; so as nevertheless such corn, grain or hay, so distrained as aforesaid, be not removed by the person distraining, to the damage of the owner thereof, out of the place where the same shall be found and seized, but be kept there as impounded, until the same shall be replevied, or sold in default of replevying the same within the time aforesaid.

Goods seized in execution cannot be distrained for rent, whilst they are in the custody of the law (*a*); the landlord's remedy is by giving notice to the sheriff, under stat. 8 Ann. c. 14. But if the execution be collusive, the landlord, after the return of the writ of execution, may distrain (*b*); or if the execution have been waived (*c*), or if, after a collusive bill of sale of the goods under the execution, they be allowed to remain upon the premises (*d*), the landlord may distrain them. But by stat. 56 G. 3, c. 50, which regulates the sale of farming produce taken in execution, where there is a covenant or custom of the country to expend the same upon the land,—it is enacted, by sect. 6, that in all cases where any purchaser of any crop or produce hereinbefore mentioned, [any straw threshed or unthreshed, any straw of crops growing, any chaff, colder or turnips, any hay, grass or grasses, whether natural or artificial, any tares or vetches, any roots or vegetables, being the produce of such land (*e*),] shall have entered into any agreement with the sheriff or other officer executing the writ, touching the use and expenditure thereof on lands let to farm, it shall not be lawful for the owner or landlord of such lands to distrain for any rent on any corn, hay, straw or other produce thereof, which at the time of such sale, and the execution of such agreement entered into under the provisions of this act, shall have been severed from the soil, and sold subject to such agreement by such sheriff or other officer,—nor on any turnips, whether drawn or growing, if sold according to the

(*z*) 2 W. & M. sess. 1, c. 5, s. 1.

(*a*) *Eaton v. Southby*, Willes, 136. *Wharton et al. v. Naylor et al.*, 17 Law J. 278, qb.

(*b*) *Blades v. Arundale*, 1 M. & S. 711.

(*c*) *Seven v. Mihill*, 1 Ld. Ken. 370.

(*d*) *Smith v. Russell*, 3 Taunt. 400.

(*e*) 56 G. 3, c. 50, s. 1.

provisions of this Act,—nor on any horses, sheep or other cattle, nor on any beast whatsoever, nor on any waggons, carts or other implements of husbandry, which any person shall employ, keep or use on such lands, for the purpose of thrashing out, carrying or consuming any such corn, &c. (*f*). But, by sect. 8, this Act shall not extend to any straw, turnips or other articles which the tenant may remove from the farm, consistently with some contract in writing. And now, by stat. 14 & 15 Vict. c. 25, s. 2, in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of *fieri facias* or other writ of execution, such crops, so long as the same shall remain on the farm or land, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that, notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer.

The seizure.] A distress is made by entering upon some part of the demised premises, and seizing some portion of the goods there in the name of the whole, or of so much thereof as may be necessary to satisfy the rent. And the landlord or his agent may, for this purpose, enter into a house, if the outer door be open (*g*). Or if a window be open, he may enter through it (*h*). But he cannot legally break open an outer door without subjecting himself to an action of trespass (*i*); although if that be open, and he enter, he may afterwards break an inner door, if it become necessary (*k*). Nor can he force the outer door even of the tenant's barn (*l*), or of his stable (*m*), or of any other building on his premises, if it be locked. But if the landlord open the outer door in the ordinary way in which other persons, using the building are accustomed to open it, he may legally do so to distrain; and therefore where the door of a stable was kept closed by a padlock attached to a movable staple, and the owner and others usually opened the door by pulling out the staple: it was holden that a distress made upon goods in the stable, after an entry in this manner, was legal (*n*). So, where a landlord, who occupied an apartment

(*f*) See *Hutt v. Morrell et al.*, 10 Law J. 240, qb.

(*g*) 1 Ro. Abr. 671, pl. 1. 5 Co. 92 a.

(*h*) 1 Ro. Abr. 671, pl. 2.

(*i*) See *Russell v. Rider*, 6 Car. & P. 416.

(*k*) Comb. 17 *Brown v. Daun*, Bul. N. P. 81.

(*l*) 9 Vin. Abr. 128, pl. 6.

(*m*) *Brown v. Glenn*, 20 Law J. 205, qb.

(*n*) *Ryan v. Shilcock*, 21, Law J. 55, ex.

over a mill which he had demised to a tenant, and which apartment was separated from the mill merely by a boarded floor without ceiling, took up some of the boards of the floor, and entered the mill by that means, in order to distrain for rent: it was holden that the entry was legal: he had not committed any trespass by taking up the boards; and in all cases where a landlord can get in without committing a trespass, he may lawfully enter to distrain (*q*). And by stat. 11 G. 2, c. 19, s. 7, where any goods or chattels, fraudulently or clandestinely conveyed or carried away by any tenant or lessee; or his or her servant or agent or other person aiding or assisting therein, shall be put, placed or kept in any house, barn, stable, out-house, yard, close or place, locked up, fastened or otherwise secured, so as to prevent such goods from being taken and seized as a distress for arrears of rent, it shall and may be lawful for the landlord or lessor, or his steward, bailiff, receiver, or other person empowered, to take and seize, as a distress for rent, such goods and chattels, (first calling to his assistance the constable, headborough, bors-holder, or other peace officer of the hundred, borough, parish, district or place, where the same shall be suspected to be concealed, who are hereby required to aid and assist therein; and, in case of a dwelling-house, oath being also first made, before some justice of the peace, of a reasonable ground to suspect that such goods or chattels are therein,) in the day time, to break open and enter into such house, barn, stable, out-house, yard, close, or place, and to take and seize such goods and chattels for the said arrears of rent, as he might have done by virtue of this or any former Act, if such goods or chattels had been put in any open field or place.

This distress must be made in the day time; it cannot legally be made after dark (*r*).

It may be made by the landlord himself, as of common right (*s*). Or it may be made by any bailiff or agent appointed by the landlord for the purpose. A mere authority to receive rent, however, will not authorise the party to distrain for it (*t*). But it seems that a receiver, appointed by the court of Chancery, may distrain for rent, without any special authority from that court for the purpose (*u*); and so may any other person duly authorised by him (*v*). And where a warrant to distrain, being directed by the landlord to J. S., or his agent,

(*q*) *Gould v. Bradstock*, 4 Taunt. 562.

(*r*) *Aldenburgh v. Peaple*, 6 Car. & P. 212.

(*s*) Co. Lit. 142. a.; Lit. s. 214. Bro. Abr. Distress, 5, 15.

(*t*) *Ward v. Shew*, 2 Bing. 632.

(*u*) *Bennett v. Robins*, 5 Car. & P. 379. See *Pitt v. Snowden*, 3 Atk. 750. *Hughes v. Hughes*, 3 Bro. Ch. Ca. 87. Bac. Abr. Distress, A.

(*v*) See *Dancer v. Hastings*, 4 Bing. 2.

g King. 206

the clerk of J. S. struck out his name, substituting that of A. B. for it; and the distress being made by A. B., the landlord had notice of it, and had several communications with A. B. respecting the sale of the goods distrained: this was holden to be a good authority to A. B.; for by directing the warrant to J. S., or his agent, an authority was thereby implied to J. S. to depute another to make the distress in his stead, and the subsequent communications with A. B. ratified this deputation (w).

If the distress is to be made by a bailiff or agent, the following may be the form of the landlord's warrant, authorizing him to make it:—

Warrant to Distrain.

To Mr. A. B., my bailiff, greeting: being the amount of one year's rent
Distrain the goods and chattels of due to me for the same at Christ-
John Nokes, [in the house he now mas-day last past; and for your so
dwells in, or "upon the farm he doing, this shall be your sufficient
now occupies," &c., as the case may warrant and authority. Dated this
be,] situate at —, for £—, —, &c.

As already mentioned, the usual mode of distraining is, by entering upon a part of the demised premises and seizing some article of furniture or the like, and saying that you seize that as a distress, in the name of so much of the goods and chattels on the premises as will be sufficient to satisfy the rent due. But where the landlord's agent merely walked round the demised premises, (a wharf,) and left a written notice that he had distrained goods lying there for rent, and that they would be appraised and sold if not replevied, &c.; and he then went away, leaving no person in possession: in an action for an excessive distress, it was holden that, as between the landlord and tenant, the seizure in this case was complete, and that the agent's going away, without leaving a man in possession, was no abandonment of the distress (x).

After the seizure, an inventory is made of so much of the goods and chattels on the premises, as may be sufficient to realize, upon a sale, the amount of the rent claimed; and at the foot of the inventory, is written a notice of the distress. This notice is rendered necessary by stat. 2 W. & M. sess. 1, c. 5, s. 2, which first gave the landlord a power of selling the distress, if "the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief

(w) See *Toplis v. Grane*, 5 Bing. 8 B. & C. 456. See *Wood v. Nunn*, N. C. 636. 5 Bing. 10.

(x) *Swan v. Earl of Palmouth*,

mansion-house or other most notorious place on the premises charged with the rent distrained for, replevy the same." This notice must be in writing; a parol notice would be insufficient (*x*). And the schedule or inventory annexed to it should in strictness specify the goods seized. But where it specified only one article, and added "and any other goods and effects that may be found in and about the said premises," and it appeared that it was intended as a distress of all the goods upon the premises, it was holden sufficient (*y*). Where, however, after particularizing several of the goods seized, the inventory added "and all other goods, chattels and effects that may be found in and about the said premises, that may be required in order to satisfy the above rent, together with the expenses," it was holden bad as to all the goods which were not particularly specified (*z*). The following may be the forms of the inventory and notice:—

Inventory of the Goods Distrained.

An inventory of the several goods and chattels distrained by me, A. B., [by the authority and on the behalf of Mr. Joseph Styles,] this — day of —, in the year of our Lord 18—, [in the house, out-houses,

&c., *as the case may be,*] of John Nokes, situate at —, for the sum of £—, being the amount of rent in arrear and due for the same [to me, or to the said Joseph Styles.]

In the Dwelling-house.

Front attic, one carpet, two chairs, [&c., describing the goods seized in each room. And the like as to

the goods on other parts of the demised premises.

Notice of Distress.

Mr. John Nokes.

Take notice that [as bailiff of Mr. Joseph Styles, your landlord, and on his behalf,] I have this day distrained the several goods and chattels mentioned in the schedule hereunto annexed, in your house [&c.] at — for the sum of —, being the arrears of rent due from you to [me or the said Joseph Styles;] and that unless you pay the said rent so

due and in arrear as aforesaid, together with the charges of distraining for the same, or replevy the said goods and chattels, within five days from this time, I shall cause the said goods and chattels to be appraised and sold, to pay the said rent and charges, according to the form of the statute in such case made and provided. Dated, &c.

This notice, according to the above directions of the statute, must be left "at the chief mansion-house, or other most noto-

(*x*) *Wilson v. Nightingale*, 15 Law J. 309, qb.

(*y*) *Wakeman v. Lindsey et al.*, 19 Law J. 166, qb.

(*z*) *Kerby v. Harding et al.*, 20 Law J. 163, ex.

rious place on the premises charged with the rent distrained for." The party distraining then leaves some person, appointed by him for the purpose, in possession of the goods distrained, in order to prevent their removal by the tenant or other person.

If there be not sufficient goods upon the premises to satisfy the whole of the rent due, or if the party distraining mistake the value of the goods he seizes, and do not take enough, he may afterwards take a second distress, in order to complete his remedy (a). This, however, should not be done, without a sufficient reason for it; the landlord should take care to distrain for the whole at once, and not for part at one time and part at another, which would be oppressive and illegal (b), unless *bonâ fide* done in one or other of the instances above mentioned. But by stat. 17 Car. 2, c. 7, after enabling the defendant in replevin to have the amount of the rent due, and the value of the goods distrained, found by the jury, it is provided by sect. 4, that "where the value of the cattle distrained as aforesaid, shall not be found to be to the full value of the arrears distrained for, the party to whom such arrears were due, his executors or administrators, may from time to time distrain again for the residue of the said arrears. So, in replevin, where the defendant avows for rent in arrear, it would not be a good plea in bar to say that the defendant had before distrained for the same rent, without averring that the rent was thereby satisfied (c). Also, if a plaintiff in replevin be nonsuit, the landlord, before executing his *retorno habendo*, may distrain the very same goods for rent subsequently accrued; and this will not amount to a waiver of his right of action against the sureties on the replevin bond (d).

Tender of the rent.] At any time before the distress, or before the cattle or goods distrained are impounded, but not afterwards, the tenant may tender the amount of the rent due (e); and if the landlord distrain, or impound the distress, after such tender, without a subsequent demand and refusal of the rent, the tenant may have his remedy by action of trespass (f), or action on the case (g). This tender may be made to the broker or agent who distrains, because, acting under the warrant of distress, he has an implied authority to

(a) *Anon.* Cro. El. 13.

(b) *Wallis v. Savill*, 2 Lutw. 1532. *Bagge v. Marby*, 22 Law J. 286, ex.

(c) *Lingham v. Warren*, 2 Brod. & B. 36. *Hudd v. Ravenor*, Id. 602.

(d) *Hefford v. Alger*, 1 Taunt. 218.

(e) *Thomas v. Harris et al.*, 1 Man. & Gr. 605; 9 Law J. 308, cp. *Ellis v. Taylor et al.*, 10 Law J. 462, ex.

(f) *Virtue v. Beasley*, 1 Moody & R. 21.

(g) *Branscomb v. Bridges*, 1 B. & C. 145.

receive the rent and costs if tendered. Even where the broker was expressly instructed by the landlord's attorney not to accept the rent, if tendered, but to refer the tenant to him, and the rent being tendered to the broker he accordingly refused to receive it, and referred the tenant to the attorney, the tender was holden sufficient (*h*). And it is not necessary that this tender should be made to the broker or agent who distrains; if made to the landlord, a subsequent detainer will be unlawful (*i*). This subject we shall have occasion further to consider hereafter, under the title "Replevin." Also, where growing crops are distrained for rent, in which case they are to be cut, gathered, cured and made, before they can be appraised or sold (*k*),—if at any time after they are distrained, and before they shall be ripe and cut, cured or gathered, the tenant or lessee, his or her executors, administrators or assigns, shall pay or cause to be paid to the lessor or landlord, for whom such distress shall be taken, or to the steward or other person usually employed to receive the rent of such lessor or landlord, the whole rent which shall then be in arrear, together with the full costs and charges of making such distress, and which shall have been occasioned thereby,—that then, upon such payment, or lawful tender thereof actually made, whereby the end of such distress will be fully answered, the same and every part thereof shall cease; and the corn, grass, hops, roots, fruits, pulse or other product so distrained, shall be delivered up to the lessee or tenant, his or her executors, administrators or assigns (*l*).

Impounding and removal.] The tenant, as we shall see presently, is allowed five days from the time of the distress and notice, to replevy the goods, before the landlord can appraise and sell them; and in the meantime the landlord must impound them, that is to say, keep them in some place of safety. If the distress consist of household goods or other dead chattels, they must be kept in a pound covert; otherwise the distrainer must answer for the consequences. This, of course, does not apply to stacks of corn, hay, &c.; for these are not removed from the premises. But where cattle are distrained, the distrainer may keep them in a pound overt or covert at his option; the only difference being, that formerly, if kept in a pound covert, the distrainer was bound to feed them; but if kept in a common pound overt, the owner was bound to take notice of it at his peril, and if kept in a special pound overt, or one specially appointed by the distrainer, the distrainer was

(*h*) *Hatch v. Hale et al.*, 19 Law J. 289, qb.

(*i*) *Smith v. Goodwin*, 4 B. & Ad. 413.

(*k*) 11 G. 2, c. 19, s. 8, *infra*.

(*l*) *Id.* s. 9.

bound to give notice of it to the owner, in both of which cases the owner was to feed them. But now, by stat. 5 & 6 W. 4, c. 59, s. 4, any person who impounds any "horse, ass, or other cattle or animal" in any common pound, open or close, or in any inclosed place, shall supply such cattle, &c., daily, with good and sufficient food and nourishment, so long as they shall be so impounded: and he may recover from the owner of the cattle, not exceeding double the value of the food so supplied, "by proceeding before any one justice of the peace, within whose jurisdiction such cattle or animal shall have been so impounded and supplied with food as aforesaid, in like manner as any penalty or forfeiture, or any damage or injury, may be recovered under and by virtue of any of the powers or authorities in this Act contained, and which value of the food and nourishment so to be supplied as aforesaid, such justice is hereby fully authorized and empowered to ascertain, determine and enforce as aforesaid." And by sect. 6, if the party impounding such cattle, &c., "shall refuse or neglect to find, provide and supply such daily good and sufficient food and nourishment" to the same, he shall forfeit and pay five shillings for every day he shall so refuse or neglect to do so,—to be recovered in like manner as any penalty under this Act. Also, by sect. 5, if any such cattle, &c., shall remain so impounded for twenty-four hours without sufficient food or nourishment, any person may enter the pound and supply them, without subjecting himself to any action or other proceeding for so doing. For the mode of proceeding upon this statute, and the necessary forms, see 1 Arch. Just. Peace, tit. "Cattle."

Formerly, as soon as the landlord distrained goods or chattels for rent, he was obliged to remove them to a pound elsewhere, unless he had the consent of the tenant to impound them on the premises; otherwise he rendered himself liable to an action of trespass (*m*). But by stat. 11 G. 2, c. 19, s. 10, reciting that this was attended with much inconvenience, and often with damage to the tenant by the removal, it was enacted that it should be lawful to and for any person lawfully making any distress for "any kind of rent," to impound or otherwise secure the distress so made, of what nature or kind it might be, in such place, or on such part of the premises chargeable with the rent, as should be most fit and convenient for the impounding and securing such distress; and to appraise, sell and dispose of the same upon the premises, in like manner, and under the like directions and restraints to all intents and purposes, as any person taking a distress for rent might then do off the premises, by virtue of stat. 2 W. & M. sess. 1, c. 5, (*infra*) or stat. 4 G. 2, c. 28; and that it should be lawful to and for

(*m*) Bro. Abr. Distress, 30; 9 Vin. Abr. Distress, E. 4.

any person whatsoever to come and go to and from such place or part of the said premises where any such distress for rent should be impounded and secured as aforesaid, in order to view, appraise and buy, and also in order to carry off or remove the same, on account of the purchaser thereof.

And by stat. 2 W. & M. sess. 1, c. 5, s. 3, where "sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land or ground charged with such rent," are distrained for rent, the party distraining must "lock up or detain the same in the place where the same shall be found, for or in the name of a distress, until the same shall be replevied;" and in default of replevying the same within the time aforesaid, [namely, within five days next after the distress made and notice given (*n*)], he may sell the same after such appraisement thereof to be made; "so as nevertheless such corn, grain or hay, so distrained as aforesaid, be not removed by the person or persons distraining, to the damage of the owner thereof, out of the place where the same shall be found and seized, but be kept there (as impounded) until the same shall be replevied, or sold in default of replevying the same, within the time aforesaid."

And in the case of "all sorts of corn and grass, hops, roots, fruits, pulse or other product whatsoever, which shall be growing upon any part of the estates demised or holden," and which shall be taken as a distress for rent, the distrainer is to cut, gather, make, cure, carry and lay up the same, when ripe, in the barns or other proper place on the premises so demised or holden; and in case there shall be no barn or proper place on the premises so demised or holden, then in any other barn or proper place which the lessor or landlord shall hire or otherwise procure for that purpose, and as near as may be to the premises; and in convenient time to appraise, sell or otherwise dispose of the same, towards satisfaction of the rent for which such distress shall have been taken, and of the charges of such distress, appraisement and sale, in the same manner as other goods and chattels may be seized, distrained and disposed of; and the appraisement thereof to be taken when cut, gathered, cured and made, and not before (*o*). Provided always that notice of the place where the goods and chattels so distrained shall be lodged or deposited, shall, within the space of one week after the lodging or depositing thereof in such place, be given to the lessee or tenant, or left at the last place of his or her abode (*p*).

Formerly the distrainer, in removing the goods distrained,

(*n*) 2 W. & M. sess. 1, c. 5, s. 2,
post, 133.

(*o*) 11 G. 2, c. 19, s. 8.
(*p*) *Id.* s. 9.

might have removed them to any place he thought fit, for the purpose of impounding them (*q*). But by stat. 52 Henry 3, c. 4, "none shall cause any distress to be driven out of the county." And by stat. 1 & 2 Ph. & M. c. 12, s. 1, for the avoiding of grievous vexations, exactions, troubles and disorder in taking of distresses and impounding of cattle, it is enacted that "no distress of cattle shall be driven out of the hundred, rape, wapentake or lathe where such distress is or shall be taken, except that it be to a pound overt within the same shire, not above three miles distant from the place where the distress is taken; and that no cattle or other goods distrained or taken by way of distress for any manner of cause at one time, shall be impounded in several places, whereby the owner or owners of such distress shall be constrained to sue several replevies for the delivery of the said distress so taken at one time: upon pain every person offending contrary to this Act shall forfeit to the party grieved, for every such offence, an hundred shillings, and treble damages."

If the distress, when impounded, be lost by the act of the distrainor, he shall be answerable for it in damages; but otherwise if lost by the act of God, without any default in the distrainor, in which case he may distrain again for the same rent (*r*).

By stat. 1 & 2 Ph. & M. c. 12, s. 2, no person shall take for impounding or keeping in pound any distress, more than four pence for any one whole distress that shall be so impounded, or less where less hath been used,—upon pain of five pounds, to be paid to the party grieved, over and beside such money as he shall take above the sum of four pence.

Appraisement and condemnation.] By stat. 2 W. & M. sess. 1, c. 5, after reciting that goods distrained for rent theretofore could not be sold, but only detained as a pledge for enforcing payment of the rent, it was enacted by sec. 2, that "where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease or contract whatsoever, and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof, (with the cause of such taking,) left at the chief mansion-house or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law,—that then, in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish or place where such

(*q*) 2 Inst. 106; 9 Vin. Abr. Distress, E. 4.

(*r*) *Vasper v. Edwards*, 1 Salk. 248.

distress shall be taken, (who are hereby required to be aiding and assisting therein,) cause the goods and chattels so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff or constable are hereby empowered to swear, to appraise the same truly, according to the best of their understandings); and after such appraisement, shall and may lawfully sell the goods and chattels so distrained, for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff or constable, for the owner's use."

In the first place, five days must elapse from the time of taking the distress and giving notice thereof. And these five days must be reckoned exclusive of the day of distress and the day of sale (*a*). And where the distress and notice were on Saturday morning the 12th May, and the goods were removed and sold in the afternoon of Thursday the 17th May, and it was argued that this was irregular, because the five days should be reckoned exclusive both of the day of the distress and of the day of sale: the court overruled the objection, saying that on the Thursday afternoon, five days from the time of the distress had completely expired (*b*). Where, however, the distress was made on Friday at two o'clock in the afternoon, and the goods were sold on the Wednesday following at eleven o'clock in the forenoon, it was holden to be wrongful, as five entire days had not elapsed before the sale (*c*). But although more than five days have elapsed since the distress, the tenant is not limited to these five days, within which to replevy the goods, but he may do so at any time before they are actually sold (*d*). And on the other hand, the landlord is not bound to sell immediately upon the expiration of these five days, but he is allowed by law a reasonable time afterwards for the appraisement and sale (*e*). But if the goods be impounded on the premises, and the landlord, at the request of the tenant, give a further time for the payment of the rent, it may be prudent to get a written consent from the tenant to the landlord's keeping possession of the goods upon the premises for the further time thus given; which will obviate all objection afterwards for his remaining in possession (*f*). The form of the tenant's consent may be thus:—

Memorandum: I John Nokes do hereby consent and agree that Mr.

Joseph Styles, or some person for him, shall continue in possession of

(*a*) *Robinson v. Waddington*, 18 Law J. 250, qb.

(*b*) *Wallace v. King et al.*, 1 H. Bl. 13.

(*e*) *Harper v. Taswell*, 6 Car. & P. 166.

(*d*) *Jacob v. King*, 5 Taunt. 451.

(*c*) *Pitt v. Shew*, 4 B. & A. 208.

(*f*) See *Fisher v. Algar*, 2 Car. & P. 374.

the goods and chattels distrained by him for rent in [my dwelling-house, &c. as the case may be,] situate at —, for the space of — days from the date hereof; the said Joseph Styles having agreed not to sell the said goods and chattels, or any part thereof, until the expiration

of that time; and I do hereby agree to pay any expenses which may be incurred by keeping possession of the said goods and chattels for the time aforesaid, and not to replevy the same. Given under my hand this — day of —, 18—. John Nokes.

Secondly, the goods must be appraised. And for this purpose the distrainer must procure two sworn appraisers to attend. And there must be two, even where the rent does not exceed 20*l.*, notwithstanding that the stat. 57 G. 3, c. 93, which regulates the costs of distresses under 20*l.*, directs that for an appraisement under 20*l.*, whether "by one broker or more," there shall be charged only sixpence in the pound (*g*). Also, the broker or other person distraining must not be one of these appraisers (*h*). The distrainer must also procure the attendance of the constable of the "hundred, parish or place" where the distress was taken; the constable of an adjoining parish will not be sufficient, even although the constable of the proper parish cannot at the time be found (*i*). The constable must then administer the following oath to the appraisers, before they make their appraisement (*k*).

Appraisers' Oath.

You and each of you shall truly appraise the several goods and chattels mentioned in this inventory,

according to the best of your understandings. So help you God.

A memorandum of this should then be indorsed upon the inventory, thus:—

Memorandum: that on the — day of —, in the year of our Lord 18—, C. D. of —, and E. F. of — two sworn appraisers, were sworn upon the Holy Evangelists, by me, G. H., constable of the parish of —, truly to appraise the goods and chattels mentioned in this in-

ventory, according to the best of their understandings,

As witness my hand,
G. H., Constable.

Present at the time of swearing the said C. D. and E. F. as above, and witness thereto, J. K.

The appraisers then proceed to appraise the goods; and having agreed upon their value, they copy the inventory, and

(*g*) *Allen v. Flicker*, 10 Ad. & El. 640. *Bishop v. Bryant*, 6 Car. & P. 484. See *Fletcher v. Saunders*, 1 Moody and R. 375, cont.

(*h*) *Andrews v. Russell*, Bul.

N. P. 81. *Westwood v. Cowne*, 1 Stark. 172.

(*i*) *Avenell v. Croker*, Moody & M. 172.

(*k*) *Kenny v. May*, 1 Moody & R. 50.

at the foot of it write their appraisement, which may be in this form :—

Appraisement.

We the undersigned C. D. and E. F., sworn appraisers, being duly sworn upon the Holy Evangelists, by G. H., constable of the parish of —, truly to appraise the goods and chattels herein-mentioned, according to the best of our under-

standings, and having viewed the said goods and chattels, do appraise and value the same at the sum of —. As witness our hands this — day of —, 18—. C. D.
E. F.

This appraisement must be stamped : where the amount does not exceed 50*l.*, the stamp required is 2*s.* 6*d.* ; exceeding 50*l.*, and not exceeding 100*l.*, 5*s.* ; exceeding 100*l.*, and not exceeding 200*l.*, 10*s.* ; exceeding 200*l.*, and not exceeding 500*l.*, 15*s.* ; and exceeding 500*l.*, 20*s.* (*k*).

Sale.] After the goods have been appraised the landlord “shall and may lawfully sell the goods and chattels so distrained, for the best price that can be gotten for the same, towards satisfaction of the rent, for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale,—leaving the overplus (if any) in the hands of the sheriff, under-sheriff, or constable, for the owner’s use (*l*).” They cannot be sold before appraisement, without subjecting the distrainor to an action at the suit of the tenant, or owner of the goods (*m*).

The sale may be by auction, or by private contract ; and in practice, where a broker distrains, it is very much the habit to sell the distress to one or both of the appraisers, who appraised it, although this is objectionable for obvious reasons.

If the goods be impounded on the demised premises, they may be sold there (*n*), or elsewhere. And where the distress consists of “sheaves, or cocks of corn, or corn loose, or in the straw, or hay, lying or being in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any of the land or ground charged with the rent,”—these must be sold upon the demised premises (*o*). But where growing crops are distrained and sold after they have been cut, gathered, cured and made,—whether such sale would be within the meaning of this statute, so as to render it necessary that it should be upon the

(*k*) 55 G. 3, c. 184, sch. tit. “Appraisement.”

(*l*) 2 W. & M. sess. 1, c. 5, s. 2, ante, p. 133.

(*m*) See *Briggins v. Goode*, 2 Cr.

& J. 364. *Knotts v. Curtis*, 5 Car. & P. 322.

(*n*) 11 G. 2, c. 19, s. 10, ante, p. 131.

(*o*) 2 W. & M. sess. 1, c. 5, s. 3, ante, p. 132.

demised premises, may perhaps be doubted, the statute 11 G. 2, c. 19, s. 8, which allows of such distress, being silent upon the subject (*p*). They cannot, however, be legally sold before they have been "cut, gathered, cured and made (*q*)."

In what cases the landlord may make a second distress, in case the goods should sell for less than the rent and expenses, see *ante*, p. 129.

Costs.] Where the rent distrained for exceeds 20*l.*, there is no law actually limiting the amount of the costs and expenses attending the levying, impounding, appraisement, and sale of the distress (*r*). But by statute 57 G. 3, c. 93, s. 6, "every broker, or other person, who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied, although the amount of the rent demanded shall exceed the sum of twenty pounds." The charges, however, must be reasonable; and the tenant may contest their reasonableness, in an action for not leaving the surplus in the hands of the constable (*s*).

But where a distress is made for arrears of rent not exceeding 20*l.*, the person making the distress or persons employed by him shall not have, take or receive any other or more costs or charges for or in respect of the same than those set down in the schedule to the act, 57 G. 3, c. 93, s. 1; and which are as follow:—

	£	s.	d.
Levying distress - - - - -	0	3	0
Man in possession, per day - - -	0	2	6
Appraisement, whether by one broker or more, 6 <i>d.</i> in the pound on the value of the goods.			
All expenses of advertisements, if any such	0	10	0
Catalogues, sale and commission, and delivery of goods, 1 <i>s.</i> in the pound on the net produce of the sale.			

"If any person or persons whatsoever, shall in any manner levy, take, or receive from any person or persons whatsoever, or retain or take from the produce of any goods sold for the payment of such rent, any other or greater costs and charges than are mentioned and set down in the said schedule, or make any charge whatsoever for any act, matter or thing mentioned in the said schedule and not really done:" the

(*p*) See *ante*, p. 128.

(*q*) *Id.*

(*r*) See *Child v. Chamberlain et al.*, 5 B. & Ad. 1049.

(*s*) *Lyon v. Tomkins*, 1 Mees. & W. 003.

party aggrieved may apply to a justice of the peace for the county, &c., in which the distress was made or proceeded in, for redress; and thereupon such justice shall summon the party complained of, shall examine into the matter of complaint, and hear the defence; and if it appear to him that the matter of complaint is true, he shall order and adjudge treble the amount of the monies so unlawfully taken, to be paid by the party so having acted, to the party complaining, together with full costs; and in case of non-payment, the justice may forthwith grant his warrant to levy the same by distress; and if no sufficient distress, he may "commit the party or parties to the common jail or prison within the limits of the jurisdiction of such justice, there to remain until such order or judgment be satisfied (x). Or if the justice find the complaint not well founded, he may order the complainant to pay costs, not exceeding twenty shillings (y). No such order, however, shall be made against the landlord, for whom the distress was made, unless he shall have personally levied such distress (z).

The justice may summon witnesses, at the instance of either party; and if they do not appear, or refuse to be examined, they shall forfeit not exceeding forty shillings, to be recovered as above mentioned (a).

Form of the Order, in favour of the Complainant.

In the matter of the complaint of A. B. against C. D., for a breach of the provisions of an Act of the fifty-seventh year of His late Majesty King George the Third, intituled "An Act to regulate the costs of distresses levied for payment of small rents,"—I, E. F., a justice of the peace for the county of — and

acting within the division of —, do order and adjudge that the said C. D. shall pay to A. B. the sum of —, as a compensation and satisfaction for unlawful charges and costs levied and taken from the said A. B. under a distress for rent; and the further sum of —, for costs on this complaint.

Form of the Order, when the Complaint is dismissed.

Same as the last form, to the words "do order and adjudge," that the complaint of the said A. B. is unfounded; [if costs are

given] and I do further order and adjudge that the said A. B. shall pay unto the said C. D. the sum of — for costs.

Returning the overplus.] After the amount of the rent distrained for, and the charges of the distress, appraisement,

(x) 57 G. 3, c. 43, s. 2.

(y) Id.

(z) Id. and see *Hart v. Leach*, 1 Mees. & W. 560.

(a) Id. s. 3.

and sale have been satisfied out of the produce of the sale, the surplus (if any) shall be left in the hands of the sheriff, under-sheriff, or constable, for the owner's use (b). And if this be not done, the tenant or owner of the goods may maintain an action on the case against the distrainer: in which action he may contest the reasonableness of the charges deducted (c). And where, in such an action, it appeared that the plaintiff had received from the broker who made the levy the balance remaining, after payment of the rent and the actual charges, making no objection to their reasonableness, and the judge at the trial laid it down, as matter of law, that such payment and receipt substantially satisfied the requisition of the statute; this was holden to be incorrect, and that it ought to have been left to the jury to say whether the plaintiff accepted such balance in satisfaction, and if not, whether the sum paid was sufficient to satisfy the real balance which ought to have been paid over (d).

2. *Fraudulent Removal of Goods to avoid a Distress.*

Landlord's remedy against the Tenant.] "If any tenant, lessee for life or years, at will, sufferance or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is reserved, due or made payable, shall fraudulently or clandestinely convey away or carry off or from such premises, his goods and chattels, to prevent the landlord or lessor from distraining the same for arrears of rent so reserved, due or made payable:" the landlord or lessor, or any person by him lawfully empowered, may, within thirty days, seize them as a distress wherever he shall find them (e), unless they have been *bonâ fide* sold (f), or given to a creditor for a *bonâ fide* debt (g); and if it be necessary to break open any door, in order to seize them, the landlord in the day time may do so, first calling to his assistance the constable or other peace officer of the hundred, parish or place where the goods are concealed, and, in the case of a dwelling-house, oath being first made before a justice of the peace, of a reasonable ground to suspect that such goods are therein (h).

"And to deter tenants from such fraudulent conveying away their goods and chattels, and others from wilfully aiding or assisting therein, or concealing the same," it is further enacted,

(b) 2 W. & M. sess. 1, c. 5, s. 2, ante, p. 133.

(c) *Lyon v. Tomkies*, 1 Mees. & W., 603.

(d) *Id.*

(e) 11 G. 2, c. 19, s. 1.

(f) *Id.* s. 2.

(g) *Bach v. Meats*, 5 M. & S. 200.

(h) 11 G. 2, c. 19, s. 7.

that "if any such tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid, or if any person or persons shall wilfully and knowingly aid or assist any such tenant or lessee in such fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same,—all and every person and persons so offending shall forfeit and pay to the landlord or landlords, lessor or lessors, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her, or them respectively carried off or concealed as aforesaid,—to be recovered by action of debt, in any of His Majesty's Courts of Record at Westminster, or in the courts of session in the counties palatine of Chester, Lancaster, or Durham" (i). The statute also gives a summary mode of proceeding before justices of the peace, where the value of the goods removed or concealed does not exceed 50*l.*; and which we shall notice presently. But the clause giving this summary mode of proceeding does not prevent the landlord from proceeding against the parties by action of debt, under the above section, although the value of the goods be under 50*l.*; in such a case he has the option of proceeding either in the one way or the other (k). Even the fact of the landlord having, in the first instance, made his complaint before the magistrates, will not preclude him from abandoning that proceeding, and adopting the action of debt instead of it (l).

Declaration against the Tenant for such Fraudulent Removal.

In the Queen's Bench.

The — day of —, A. D. 18—. Middlesex to wit: J. S., the plaintiff in this suit. by A. B., his attorney, sues J. N., the defendant in this suit: for that the defendant, on — being then tenant [from year to year, or for a certain term of years then unexpired] to the plaintiff of a [certain messuage and lands], at the rent of — by the year, payable quarterly, and [two quarters] of the said rent being then due and unpaid, did fraudulently [and clandestinely] remove, convey away and carry off from the said premises, divers goods and chattels of him the said defendant, in order

to prevent the plaintiff, as landlord of the said premises, from distraining the same for the said rent so due and unpaid as aforesaid, contrary to the form of the statute in such case made and provided. And the plaintiff in fact saith that the goods and chattels so by the defendant removed, conveyed away and carried off from the said premises as aforesaid, were then of great value, to wit, of the value of [£100]; whereby and by force of the statute in such case made and provided, an action hath accrued to the plaintiff to demand and have of and from the defendant the sum of [£200], being double the value of the goods

(i) 11 G. 2, c. 19, s. 3.

(k) *Bromley v. Holder*, Moody & M. 175.

(l) *Horsefall v. Davy*, 1 Stark. 169.

and chattels so by the defendant removed, conveyed away and carried off from the said premises as aforesaid. And the plaintiff claims £ —.

The venue is not local (*m*).

General Issue.

In the Queen's Bench.

The — day of —, A. D. 18—.

J. N. }
ats. } The defendant, by C. D., his attorney, says that he is not guilty.
J. S. }

This seems to be the proper general issue, these actions on statutes for penalties by the party grieved being "actions for wrongs independent of contract," within the meaning of stat. 15 & 16 Vict. c. 76, sch. B.

Evidence for Plaintiff.

Under the general issue, the plaintiff must prove,—

1. The tenancy, as stated in the declaration, by producing and proving the lease, if any ; or by producing and proving the agreement under which the defendant holds, and if it be for a term exceeding three years, by proving a previous payment of rent by the defendant, so as to raise the implication of a tenancy from year to year (*n*) ; or by proving a parol letting for three years or less (*o*) ; or by proving a previous payment of rent, from which a tenancy from year to year may be implied (*p*) ; or that the defendant became tenant to the plaintiff by assignment from another (*q*) ; or by attornment (*r*). And the holding must appear to be such as to leave a reversion in the plaintiff after the determination of the demise ; or at least, the contrary must not appear ; for if the plaintiff, by his contract with the defendant or the person under whom the defendant claims, parted with the whole of his term or interest, although he reserved rent, the plaintiff must be nonsuit, the statute extending only to cases where the plaintiff has reserved to himself a reversion in the demised premises (*s*). And the same where it appears that the plaintiff conveyed his reversion to another before the removal of the goods (*t*).

(*m*) See *Fife v. Boutfield*, 13 Law J. 306, qb.

(*n*) See *ante*, p. 61.

(*o*) See *ante*, p. 59.

(*p*) See *ante*, p. 68.

(*q*) See *ante*, p. 73.

(*r*) See *ante*, p. 80.

(*s*) *Pluck v. Digges*, 2 Daw. & Clarke, 180.

(*t*) *Ashmore v. Hardy*, 7 Car. & P. 501.

2. That the defendant was indebted to the plaintiff in a certain sum, for rent of the demised premises, due and payable at or before the time of the removal; for the statute extends only to cases where the removal has been after the rent has become due (*w*). And where the removal was on the very day the rent became due, and the jury found that the tenant had fraudulently removed the goods for the purpose of preventing a distress, it was holden to be a case within the statute (*x*). But a variance between the rent stated and that proved, is immaterial (*y*). It is not necessary, however, to prove that there was any attempt to distrain for the rent in arrear, or that it was even contemplated (*z*).

3. That after the rent became due (*a*), goods and chattels were removed from the demised premises, either by the defendant, or with his privity and consent (*b*), fraudulently, or clandestinely, in order to prevent the plaintiff from distraining on them for the rent so in arrear. This intent is entirely a question for the jury (*c*); and the plaintiff must prove facts from which the jury may fairly infer it. In the first place, the landlord should prove, if it be practicable, that after the removal of the goods in question, no goods, or not sufficient goods, were left upon the demised premises, whereon he could distrain for his rent (*d*): for if the tenant left sufficient goods upon the premises to satisfy the rent, if distrained upon, the removal cannot be said to have been fraudulent, or done with intent to deprive the landlord of his remedy by distress. And on the other hand, if by the removal of the goods, the landlord be actually deprived of his remedy by distress, in whole or in part, the jury may fairly infer the intent of the removal from the effect of it. The removal may be clandestine, that is to say, effected in the night, or at such a time or in such a way that it was not probable that it would come to the knowledge of the landlord, before it was completed (*e*); or it may be fraudulent, though not clandestine; for the words of the first section of the statute, to which the third section expressly refers, are "fraudulently or clandestinely convey away," &c. And even where a tenant, openly, and in the face of day, and with notice to his landlord, removed his goods, without leaving sufficient upon the premises to satisfy the rent then due, and

(*w*) *Watson v. Maine*, 3 Esp. 15.
Rand v. Vaughan, 1 Bing. N.C. 767.
Northfield v. Nightingale, 1 Cr. & M. 280, n.

(*x*) *Dibble v. Bowater et al.*, 22 Law J. 396, qb.

(*y*) *Gwinnett v. Phillips et al.*, 3 T. R. 643.

(*z*) *Stanley v. Wharton*, 10 Price, 138.

(*a*) Vide *supra*.

(*b*) *Lister v. Brown*, 3 D. & Ry. 501.

(*c*) See *John v. Jenkins*, 1 Cr. & M. 227. *Opperman v. Smith*, 4 D. & Ry. 33.

(*d*) *Parry v. Duncan*, Moody & M. 531.

(*e*) See *Watson v. Maine*, 3 Esp. 15.

the landlord followed the goods, and distrained them: the court held that although this removal was not clandestine, yet inasmuch as it had the effect of depriving the landlord of his remedy by distress, the jury were well warranted in finding it fraudulent; and that the statute applied to all cases, where a landlord, by the conduct of his tenant in removing goods from premises for which rent is due, is turned over to the barren right of bringing an action for his debt (*f*). The mere removal, however, must not be considered as conclusive evidence of fraud; it may have been under circumstances which would exclude any implication to that effect (*g*); and it is entirely a question for the jury, whether they can fairly imply fraud, or the intent mentioned in the statute, from the removal, coupled with its attending circumstances.

The goods must be the property of the tenant; at least the contrary should not appear from the plaintiff's evidence; for the statute does not apply to a removal of the goods of a stranger (*h*).

4. The value of the goods. If the goods have been traced and found, it will be easy to prove their value, after proving their identity; but if not, the plaintiff must give the best evidence of it he can procure, of those who saw them removed, or who saw them previously to their removal, or otherwise.

Evidence for the Defendant.

By stat. 21 Jac. 1, c. 4, s. 4, the defendant, in all actions for penalties, may plead the general issue, and give such special matter in evidence to the jury, as, if pleaded, would have been good matter in law to discharge the defendant as to such action. And the statute has been holden to extend to this action (*i*), and all other actions for penalties by parties grieved (*h*). Among other things, the defendant may prove—that by the contract between him and the plaintiff, the latter parted with the whole of his term or other interest; and that it was in law an assignment and not a lease (*l*); or that the plaintiff, before the removal of the goods, had parted with his reversion in the demised premises (*m*); or that the removal was before

(*f*) *Opperman v. Smith*, 4 D. & Ry. 33.

(*g*) See *Parry v. Duncan*, 7 Bing. 243.

(*h*) *Postman v. Harrell*, 6 Car. & P. 225. *Thornton v. Adams*, 5 M. & S. 38; and see *Fletcher v. Marillier et al.*, 9 Ad. & El. 457.

(*i*) *Jones v. Williams*, 4 Mees. & W. 375.

(*h*) 1 Arch. N. P. 340, 351.

(*l*) *Pluck v. Digges*, 2 Dow. & Clarke, 180.

(*m*) *Ashmore v. Hardy*, 7 Car. & P. 501.

the rent became due (*o*); or that it was done without his privity or consent (*p*); or that sufficient distrainable goods were left upon the premises, whereon the landlord might realize the amount of his rent by distress (*q*); or any other facts showing that the removal was not fraudulent, or clandestine, or effected to deprive the landlord of his remedy by distress:—all which will be good defences to the action.

Landlord's remedy against Persons aiding or assisting in such fraudulent Removal.

Declaration.

In the Queen's Bench.

The — day of —, A.D., 18—.

Middlesex to wit: J. S., the plaintiff in this suit, by A. B. his attorney, sues J. N., the defendant in this suit: For that one E. F., on —, being then tenant [from year to year, or for a certain term of years then unexpired,] to the plaintiff, of a [certain messuage and lands,] at the rent of — by the year, payable quarterly, and [two quarters of the said rent being then due and unpaid,] did fraudulently [and clandestinely] remove, convey away and carry off from the said premises divers goods and chattels of him the said E. F., in order to prevent the plaintiff, as landlord of the said premises, from distraining the same for the rent so due and unpaid as aforesaid; and that the defendant well knowing the premises, did then unlawfully, wilfully and knowingly

aid and assist the said E. F., in such fraudulent conveying away and carrying off [and concealing] the said goods and chattels; contrary to the form of the statute in such case made and provided. And the plaintiff in fact saith, that the goods and chattels so removed, conveyed away and carried off from the said premises, [and concealed] as aforesaid, were then of great value, to wit, of the value of [£100,] whereby, and by force of the statute in such case made and provided an action hath accrued to the plaintiff, to demand and have of and from the defendant the sum of [£200,] being double the value of the said goods and chattels so removed, conveyed away, and carried off from the said premises, [and concealed] as aforesaid. And the plaintiff claims £—.

General Issue and Evidence.

The general issue is the same as *ante*, p. 141. Under this plea, the plaintiff must prove,—

1. The tenancy, the rent due, and that the goods were fraudulently or clandestinely removed in order to deprive him the plaintiff of his remedy by distress, as in the last case. And

(*o*) *Watson v. Main*, 3 Esp. 15.
Rand v. Vaughan, 1 Bing. N. C.
 767. *Northfield v. Nightingale*, 1
 Cr. & M. 230, n.

(*p*) *Lister v. Brown*, 3 D. & Ry.
 501.

(*q*) *Vide supra*.

the acts and orders of E. F. will be good evidence of his own fraud (*r*).

2. That the defendant wilfully aided or assisted E. F. either personally or by means of others, in removing or carrying off the goods, or in concealing them after they were removed. And in proof of concealment, it is not necessary to prove that the goods were actually withdrawn from sight; if it be proved that cattle, for instance, which had been fraudulently removed, were placed in a neighbour's field, so as to cause a difficulty to the landlord in finding them, it would be sufficient (*s*). Whether it be proved that the defendant himself personally assisted, or caused others to do so, seems to be immaterial; and the plaintiff will be allowed to lay before the jury circumstances of suspicion, to prove such a fraudulent co-operation by the defendant as the statute contemplates (*t*). But where a *bonâ fide* creditor of the tenant, knowing the latter to be in distressed circumstances, and fearing lest the property on the demised premises should be distrained for rent, went there, and seized several cattle which were upon the premises, and with the consent of the tenant drove them off, in satisfaction of his debt: this was holden not to be a case within the statute, the court saying that they knew of no law which prevented a creditor from obtaining payment of his debt, in money or money's worth; if indeed the tenant had first proposed it, and the creditor had merely acceded to the proposal, it might be otherwise (*u*).

3. That at the time the defendant so assisted E. F. in removing the goods, he knew that he was removing them fraudulently and with intent to deprive the landlord of his remedy by distress; or, where the assistance is in concealing the goods, that he knew that they had been so removed, fraudulently and with the intent here mentioned. It is not sufficient to prove the assistance alone, but the guilty knowledge must also be proved; and in an action thus against a third party, the case should be brought, by strict proof, within the words of the statute (*v*). But as guilty knowledge cannot be proved expressly, the landlord can only prove it by the admissions or confession of the defendant, or by proving facts from which the jury may fairly imply it.

As to the evidence for the defendant, see *ante*, p. 143.

(*r*) *Stanley v. Wharton*, 9 Price, 301; 10 Id. 138.

(*s*) Id.

(*t*) Id.

(*u*) *Rach v. Meats et al.*, 5 M. & S. 200.

(*v*) *Brooke v. Noakes*, 8 B. & C. 537.

Summary Proceedings for the like Offence.

But where the value of the goods and chattels, so fraudulently or clandestinely carried off or concealed, shall not exceed 50*l.*, the landlord, or his bailiff, servant or agent, may exhibit a complaint in writing, before two justices of the peace of the county, &c., and residing near the place from which such goods were removed or where they were found (*x*), not being interested in the lands or tenements from which the same were removed; who may summon the parties concerned, examine the fact, and all proper witnesses upon oath, and in a summary way determine whether the party complained of be guilty of the offence, and may in like manner inquire into the value of the goods; and upon full proof of the offence, such justices, by order under their hands and seals, shall adjudge the offender or offenders to pay double the value of the said goods and chattels to such landlord, his bailiff, servant, or agent, at such time as the said justices shall appoint; and in default of payment, the justices may cause the same to be levied by distress; or for want of distress, they may commit the offender to the house of correction, there to be kept to hard labour for six months, unless the money be sooner paid or satisfied (*y*). Where the justices proceeded to adjudicate upon this section, and made an order against the tenant, although it appeared that the title to the premises was disputed, and the tenant had actually paid his rent to one of the claimants: it was holden that they had jurisdiction to do so, and that therefore an action of trespass would not lie against them (*z*). In this case also, the warrant of commitment did not state that there had been a complaint in writing, or that the examination of the witnesses had been upon oath, but it referred to the order, which stated those matters; and the court held it to be sufficient (*a*).

The complaint in this case may in fact be made to one justice, and he may issue the summons (*b*); but the case must be heard before two justices, and the order must be made by them. The order may be in the following form:—

Order.

Berkshire, to wit: Whereas J. N. of — farmer, stands duly charged before us, J. P. and R. S. esquires, (two of Her Majesty's justices of the

peace in and for the said county, residing near the place [whence the goods and chattels hereinafter mentioned were removed, or, where the

(*x*) See *R. v. Morgan*, Cald. 156.

(*y*) 11 G. 2, c. 19, s. 4.

(*z*) *Coster v. Wilson et al.*, 3 Mees. & W. 411; Horn & H. 141.

(*a*) *Id.*

(*b*) 11 & 12 Vict. c. 43, s. 29.

goods and chattels hereinafter mentioned were found), and not being interested in the lands and tenements whence such goods and chattels were removed,) by the complaint in writing of C. D. bailiff of J. S. of —, in the said county, for that he the said J. N., on — at —, being then and there tenant from year to year to the said J. S. of a certain messuage and lands there situate, upon the demise and holding whereof a certain rent, to wit, the rent — by the year, payable quarterly, was reserved and made payable, and being then indebted unto the said J. S. for certain arrears of rent reserved, and then due and payable for the said messuage and lands, did then and there fraudulently [and clandestinely] remove, convey away and carry off from the said premises divers of his goods and chattels, not exceeding the value of £50, to wit, of the value of £30, in order to prevent the said J. S., the landlord of the said premises, from distraining for the said arrears

of rent so due and payable as aforesaid; against the form of the statute in such case made and provided. And the said J. N., being duly summoned to appear before us in this behalf, now appears and is present accordingly [or as the fact may be]. We the said justices, thereupon, having now examined the fact, and all proper witnesses upon oath, do hereby determine that the said J. N. is guilty of the said offence so charged against him as aforesaid; and we the said justices, having inquired into the value of the goods and chattels so removed, conveyed away and carried off as aforesaid, do find that the value of the same was and is £30: Wherefore we the said justices do hereby order and adjudge the said J. N., to pay unto the said J. S., or to his bailiff, servant, or agent, the sum of £60 (being double the value of the said goods and chattels), on or before the — day of — instant. Given under our hands and seals, at —, the — day of —, &c.

See as to this order, *R. v. Bissey*, Sayer, 304. It must appear upon the face of it, that the party complaining is the landlord, or his bailiff, servant or agent, and that the party who removed the goods or caused them to be removed was the tenant (c). It must also show that a complaint in writing was exhibited before the justices by the landlord or his agent (d). It need not, however, enumerate the goods removed (e). An order against a third party, for aiding or assisting the tenant in the fraudulent removal, or in concealing the goods after being fraudulently removed, may readily be framed from this form and the form of declaration, *ante*, p. 144. Where the order, in charging the parties who were aiding and assisting the tenant, did not allege that they "wilfully and knowingly" did so, it was holden bad on that account (f).

The party may appeal against this order, to the next general or quarter sessions (g); and if he enter into recognizance with one or two sureties to appear at the sessions, &c., the order shall not in the mean time be executed (h).

(c) *R. v. Davis*, 5 B. & Ad. 551.

(d) *Ex. p. Fuller*, 13 Law J. 141, m.

(e) *R. v. Rabbits*, 6 D. & R. 341.

(f) *R. v. JJ. of Radnorshire*, 9 Dowl. 90.

(g) 11 G. 2, c. 19, s. 5.

(h) *Id.* s. 6.

3. Pound Breach and Rescue.

The civil remedy, at common law, for pound breach, was by writ *de parco fracto*; and for the rescue of a distress for rent, by writ of rescous. But by stat. 2 W. & M. sess. 1, c. 5, s. 4, it is enacted that "upon any pound breach, or rescue of goods or chattels distrained for rent, the person or persons grieved thereby shall, in a special action upon the case for the wrong thereby sustained, recover his and their treble damages and costs of suit against the offender or offenders in any such rescue or pound breach, any, or either of them,—or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession" (*h*).

And by stat. 11 G. 2, c. 19, s. 10, (which gave landlords the right to impound, upon the demised premises, goods or cattle distrained for rent,) it is enacted, that if any pound breach or rescue shall be made of any goods or chattels, or stock, distrained for rent, and impounded, or otherwise secured by virtue of this Act, the person or persons aggrieved thereby shall have the like remedy, as in cases of pound breach or rescue is given and provided by stat. 2 W. & M. sess. 1, c. 5, s. 4 (*i*).

And in both cases, the landlord may again seize the goods so rescued, &c., wherever he can find them (*k*), if he can do so without a breach of the peace (*l*).

In the case of a rescue, it will be a good defence for the tenant, that the distress was taken without cause or contrary to law,—as that no rent was due, or that the distress was taken on the highway, or the like,—for in such a case the owner may lawfully rescue (*m*). But if the goods be once impounded, even although they have been taken without cause, the owner may not break the pound, to get them out; for they are then in the custody of the law (*n*).

Besides the civil remedy above mentioned, it is a misdemeanor at common law, and punishable as such, to break the pound, in which goods distrained for rent have been impounded, in order to rescue them (*o*). But a mere rescue, on their way to the pound, is the subject merely of a civil action, as above mentioned, and not of an indictment (*p*).

(*h*) See *Casleman v. Hicks*, C a r (m) Co. Lit. 160, 161. & M. 266.

(*i*) See Co. Lit. 161. Bac. Abr. (n) Co. Lit. 47.

"Rescue," A. (o) 1 Russ. 363.

(*k*) Co. Lit. 47.

(*p*) *R. v. Bradshaw*, 7 Car. & P. 233.

(*l*) *Rich v. Woolley*, 7 Bing. 651.

SECTION II.

Remedy for Rent by Action.

1. *Action upon Lease for Rent.*

In the Queen's Bench.

The — day of —, A. D. 18 —
Venue.] A. B. by E. F. his attorney, [or in person] sues C. D.: For that the plaintiff let to the defendant [a house, No. 401, Piccadilly], for

seven years, to hold from the — day of —, A. D. — at £ — a year, payable quarterly; of which rent — quarters are due and unpaid. And the plaintiff claims £ —.

As to cases where the lessor has assigned his reversion, or the lessee his term:—it is well established that if a reversioner assign his reversion, the assignee may have an action of debt for rent (*q*), or covenant, for a breach of any covenant running with the land (*r*), against the lessee; or if the lessee have assigned his term, the lessor or assignee of the reversion may in like manner have debt or covenant against the assignee of the term (*s*).

Debt and covenant by the lessor against the lessee, are transitory actions, and may be brought in any county, because brought by and against the contracting parties themselves (*t*); and this even although the lands be out of the kingdom (*u*). So, covenant by the assignee of the reversion against the lessee, or by the lessee against the assignee of the reversion, is transitory, and may be brought in any county; for although not between the original contracting parties, yet as the statute 32 H. 8, c. 34, transfers the privity of contract as to covenants to the assignee, he may bring this action in any county, in the same manner as the lessor might (*v*). But debt by the assignee of the reversion against the lessee is local, and must be brought in the county where the lands lie; because it is founded upon the privity of estate, and not upon the privity of contract (*w*). So, debt or covenant by the lessor against the assignee of the term (*x*), or by the executor of the lessor (*y*), or covenant by the assignee of the term against the lessor (*z*),

(*q*) Y. B. 5 H. 7, 186, 19, a; Bro. Dettie, 141; 1 Ro. Abr. 591; 3 Co. 22, b; 4 Mod. 81; 3 Mod. 338; Carth. 161. *Allen v. Bryan*, 5 B. & C. 512.

(*r*) 1 Saund. 237. See Bro. Sum. & Sev. 6.

(*s*) 3 Mod. 337, 338; 1 Show. 199, Carth. 182; 1 Salk. 80, 81. See also Bac. Abr. Debt, C. D.

(*t*) 7 Co. 2, a; Cro. Jac. 142.

(*u*) 6 Mod. 194; 2 Salk. 651; 2 Str. 776; Carth. 182; 6 Mod. 194.

(*v*) 1 Saund. 237, 244, b; 1 Lev. 250.

(*w*) Cro. Car. 184; and see Id. 143; T. Jon. 43.

(*x*) Carth. 182, 183; T. Jon. 43; 1 Wils. 165.

(*y*) Hob. 37.

(*z*) 5 Co. 17, a; F. N. B. 140, C.

are local, and must be brought in the county where the lands lie. So, debt or covenant by the assignee of the reversion against the assignee of the term (a), or covenant by the assignee of the term against the assignee of the reversion (b), is local, and the venue must be laid in the county in which the land lies. Debt or covenant by the lessor against the executor of the lessee, for arrears of rent, &c., accrued in the testator's lifetime, is transitory; but if brought for rent, &c., accrued in the executor's time, it is local, because the executor is then chargeable as assignee (c).

If the rent be reserved half-yearly, quarterly, monthly, or even weekly, an action lies for each payment as it becomes due (d).

By stat. 8 Ann. c. 14, s. 4, reciting that no action of debt then lay against a tenant for life or lives, for any arrears of rent, during the continuance of such life or lives, it is enacted that, thereafter, it should be lawful for any persons having any rent in arrear or due upon any lease or demise for life or lives, to bring an action of debt for such arrears of rent, in the same manner as they might have done in case such rent were due and reserved upon a lease for years.

You cannot join a count for use and occupation with this, in the same declaration (e).

General Issue and Evidence under it.

The general issue (if indeed it may be called such) to this form of declaration is *non dimisit* (f). Formerly *nil debet* was deemed a good plea; but now it is no longer so; and *nunquam indebitatus* is allowed only in debt on simple contract. In all other cases, where *nil debet* could formerly be pleaded, the defendant must now either deny specifically some matter of fact alleged in the declaration, or plead specially in confession and avoidance. Where the declaration stated a demise of a messuage, land, and premises, with the appurtenances, and the proof was of a demise of a house and land, together with the furniture, utensils, and implements, the court held, that as the rent issued out of the realty only, and not out of furniture, &c., it was sufficient to allege a demise of the realty alone, and therefore that this was not a variance (g). Where the declaration stated a demise from year to year, and an assignment of

(a) 3 Mod. 337, 338; 1 Show. 199; Carth. 182; 1 Salk. 80, 81.

(b) 5 Co. 17, a; F. N. B. 146, C.

(c) Latch, 262, 271; 3 Co. 24; 1 Sid. 266; 2 Lev. 80.

(d) Co. Lit. 476, 292. b.; Ro. Abr. 601; Bac. Abr. Debt, B.

(e) R. G. H. 4 W. 4, s. 5.

(f) See Bul. N. P. 170.

(g) Farewell v. Dickinson, 6 B. & C. 251.

the term to the defendant, and the evidence was of an agreement for a lease for seven years, at a certain rent, an occupation for a year under that agreement and a payment of two quarters' rent, by the tenant, and an assignment by the tenant of his interest to the defendant: the court held that the evidence supported the declaration; it proved that this was in law a tenancy from year to year, and if so, the tenant had a good assignable interest (*h*).

If a written lease be given in evidence, it must be correctly stamped. See as to the stamp on leases, *ante*, p. 42.

An instrument purporting to be a lease, if not signed or executed by the lessor, does not require a stamp as such (*i*).

Where an unstamped lease is afterwards stamped by order of the commissioners, it is the stamp which is required by law at that time that must be affixed to it; and this will be deemed sufficient, although a greater stamp would have been required at the date of the instrument (*k*).

Plea, Riens in Arrear.

The defendant, by G. H., his attorney, says that no part of the said rent in the said declaration mentioned, was, at the time of the commencement of this suit, due or unpaid.

Where, in debt for rent, the defendant pleaded that "nothing of the rent is in arrear and unpaid," the court held the plea to be good; it was the same as *nil debet*, which was also in the present tense, and related, not to the time of the plea pleaded, but to the commencement of the action (*l*).

Evidence.

Although in form, the onus of proving this issue is upon the plaintiff, yet as it will be sufficient for him to prove the tenancy, either by proving the lease, if there be one, or proving the occupation of the defendant and payment of former rent, from which a parol demise will be presumed, the defendant will be obliged to prove the actual payment of the rent. And a receipt for rent due at a particular time, will be good presumptive evidence that all previous rent has been paid; but this, like every other presumption, may be rebutted, or it may be shown that the receipt itself was obtained collusively and by fraud (*m*).

(*h*) *Braythwaite v. Hitchcock*, 10 Mees. & W. 404.

(*i*) *Doc v. Wiggins*, 4 Q. B. 307.

(*k*) *Buckworth v. Simpson et al.*, 1 Cr. M. & R. 834.

(*l*) *Warner v. Theobald*, Cowp. 586.

(*m*) *Shalfe v. Jackson*, 3 B. & C. 421. *Farrar et al. v. Hutchinson*, 9 Ad. & El. 641.

Plea, Eviction.

The defendant, by G. H., his attorney, says that the plaintiff, after the making of the said indenture [or demise], and before any part of the rent in the declaration mentioned became due, to wit, on —, with force and arms, &c., entered

into and upon the demised premises, and then ejected, expelled, put out, and amoved the defendant from the possession thereof, and kept and continued the defendant so ejected, expelled, put out, and amoved, from thence hitherto.

The plea must state an eviction or expulsion of the defendant, out of all or some part of the demised premises; he must be put out of possession (*e*); a mere trespass by the lessor will not be sufficient (*f*). And the plea must state an eviction and expulsion of the lessee by the lessor, and a keeping of him out of possession until after the rent became due; otherwise it will be bad (*g*). Where the lessee of certain land for a year accepted the lease, and entered upon the land, but he then found eight acres of it in the possession of another person, entitled under a prior lease from the lessor, and that person kept possession of the eight acres until a half year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder: it was holden that the demise was wholly void as to the eight acres, and that the rent was not apportionable; that as there was no valid demise of the whole subject-matter, nor any distinct rent reserved for that part of which there was a valid demise, the lessor was not entitled to distrain for the whole or any part of the rent (*h*).

Plea, Term Assigned.

The defendant, by G. H., his attorney, says that after the making of the said demise [or indenture] in the declaration mentioned, and before any part of the said rent in the declaration mentioned became due and payable, to wit, on —, he the defendant, by a certain indenture of assignment by him then made, and duly signed by him and sealed with his seal, did bargain, sell, assign, transfer, and set over to one J. S. all the right, title, interest, term of years then to come and un-

expired, property, claim and demand whatsoever of him, the defendant of in and to the said several demised premises with the appurtenances; by virtue of which said indenture of assignment, the said J. S. then entered into the said demised premises with the appurtenances, and became and was thereof possessed for the residue of the said term therein then to come and unexpired, whereof the plaintiff then had notice; and the defendant further saith that the plaintiff,

(*e*) 1 Saund. 204, n. 2 Co. Lit. 148. b.

(*f*) Id. *Hunt v. Cope*, Cowp. 242. *Roper v. Lloyd*, T. Jon. 148.

(*g*) *Reynolds v. Buckle*, Hob. 326. *Page v. Parr*, Sty. 432.

Bushell v. Lechmere, 1 Ld. Raym. 370.

(*h*) *Neale v. M'Kenzie*, in error, 1 Mees. & W. 747. See *Watson v. Ward*, 22 Law J. 161, ex.

after the entry of the said J. S. into the said demised premises with the appurtenances, by virtue of the said indenture of assignment, to wit, on —, did accept and receive of and from the said J. S. a cer-

tain large sum of money, to wit, the sum of £—— for the rent aforesaid, in form aforesaid reserved and made payable, and then accepted the said J. S. as his tenant of the said demised premises.

This is a good plea to debt for rent, but not to an action of covenant (i).

Other Pleas.

It is a good plea to say that the plaintiff levied the whole amount of the rent claimed, or a certain part of it, by distress and sale. But it is no answer to an action for rent, to say that the plaintiff distrained goods to the value of the rent, if in fact he have sold them for a less sum; if he have sold them at too low a price, the tenant's remedy is by action (k).

Any payment a tenant is compelled to make for his landlord, may be made the subject of a plea in an action by the latter for rent (l); as if, upon default of his landlord to pay rent due to the head landlord, he pay the rent, under an apprehension that the latter may distrain his goods for it, he may make such payment the subject of a plea to an action by his landlord for rent which accrued due, either before or after it (m).

If by the terms of the lease, the tenant may determine it by notice, and he does accordingly determine it, and quits possession, he may plead this to an action for any rent subsequently accruing (n). See a plea of a discharge of the plaintiff under the Insolvent Act, and payment to his assignee, *Partington v. Woodcock*, 6 Ad. & El. 690; a plea of judgment for the defendant in a former action for the same cause, *Carter v. James*, 13 Mees. & W. 137. He cannot, however, plead any matter in denial of his landlord's title (o), unless the latter's interest have been determined by effluxion of time, or by act of law (p). And if the letting were by indenture, the tenant is estopped from denying it (q).

But it is no defence, that the demised premises have been

(i) 3 Co. 24, b. *Thursby v. Plant*, 1 Saund. 240. 2 Saund. 302, n. 5.

(k) *Efford v. Burgess*, 1 Moody & R. 23.

(l) See *Clumell v. Read*, 7 Taunt. 50. *Taylor v. Zamira*, 6 Taunt. 324. *Dyer v. Bowley*, 2 Bing. 94.

(m) See *Carter v. Carter*, 5 Bing. 406; and see *Sapsford v. Fletcher*, 4 T. R. 511.

(n) See *Caddy v. Martinez*, 9 Law J. 281, qb.

(o) See *Hall v. Butler et al.*, 10 Ad. & El. 204. *Parker v. Manning*, 7 T. R. 637.

(p) See *Hill v. Saunders*, in error, 4 B. & C. 529.

(q) *Wilkins v. Wingate*, 6 T. R. 62. *Parker v. Manning*, 7 Id. 537. *Blake v. Forster*, 8 Id. 487.

burnt down, and have not been rebuilt (*u*); nor will a court of equity in general interfere in such a case (*v*).

2. Action of Covenant for Non-payment of Rent.

Venue.] A. B., the plaintiff in this action, by E. F., his attorney, sues C. D., the defendant in this action: For that the plaintiff by deed let to the defendant [a house, No. 401, Piccadilly], for seven years, to hold from the — day of — A.D. —

at £—— a year, payable quarterly; and the defendant by the said deed covenanted to pay the same; yet — quarters of the said rent are due and unpaid. And the plaintiff claims £——.

The lessee is always liable upon his covenants, during the term, although he may have assigned it to another; he cannot even plead a tender of the rent by the assignee (*w*). And the lessor's having accepted the assignee as his tenant, by receiving rent from him, makes no difference in this respect; it is no defence whatever in covenant (*x*), although it would be a defence, in debt for the rent, if the acceptance, or some assent of the lessor equivalent to it, be pleaded and proved, but not otherwise (*y*). In no case, however, can the landlord maintain this action against a mere under-lessee (*z*).

If the defendant have in fact paid the rent up to the time of the commencement of the action,—if he paid it before or on the day, he may traverse the non-payment (*a*), if he pay it after the day, he may plead the payment by way of accord and satisfaction (*b*). But he cannot plead *riens in arrear*, for that would confess the breach of covenant, and would go merely in mitigation of damages (*c*). There is a distinction in this respect between debt for rent and covenant; in the former *riens in arrear* is a good plea, in the latter not (*d*). Even where the breach was, that during the term, to wit, on the 25th March, 1826, 66*l.* 5*s.* for two quarters, ending the day aforesaid, became and is still due and in arrear, and the defendant pleaded that no quarter's rent ending the 25th March, then became due, &c.: the plea was holden bad; as it could not traverse the day, it was nothing more than *riens in arrear*, and that was a bad plea in covenant (*e*). Where the covenant

(*u*) *Balfour v. Weston*, 1 T. R. 312. *Izon v. Gorton*, 5 Bing. N. C. 501. *Packer v. Gibbons*, 1 Gale & D. 10. *Baker v. Holtzapffell*, 4 Taunt. 45.

(*v*) *Holtzapffell v. Baker*, 18 Ves. 115.

(*w*) *Orgill v. Kemshead*, 4 Taunt. 642.

(*x*) *Barnard v. Godscall*, Cro. Jac. 309; Bul. N. P. 159.

(*y*) *Wadham v. Marlow*; 8 East, 314; 1 H. Bl. 438, n.

(*z*) *Halford v. Hatch*, 1 Doug. 183.

(*a*) See 1 Arch. N. P. 368.

(*b*) See 1 Arch. N. P. 371.

(*c*) *Hare v. Saville*, 1 Brownl. 19.

(*d*) *Warner v. Theobald*, Cowp. 588.

(*e*) *Baden v. Flight*, 3 Bing. N. C. 685. And see 4 Id. 35.

was, to pay rent at the time and in the manner reserved in the lease, and no place of payment was named, it was holden to be no defence to an action upon the covenant that the lessee was upon the land demised, on the day the rent became due, with the money ready to pay it, but that the lessor was not there ready to receive it (*f*).

That the plaintiff, or some other person by title paramount, before the rent in question became due, ejected and expelled the defendant from the demised premises, or part of them, would be a good answer to the action. And in such a case, if the action be brought against the lessee himself, the rent cannot be apportioned, as the action is founded on the privity of contract merely: but where the action is brought against the assignee of the lessee, the rent is apportionable, the action being founded on the privity of estate, not privity of contract (*g*). Where in covenant for rent upon a lease of tolls, the plea stated that the plaintiff entered upon a certain portion of the tolls, and ejected and expelled the defendant from the possession thereof, and kept and continued him expelled &c., from thence hitherto; and the replication was, that the plaintiff did not enter, &c., or eject or expel the defendant, *modo et formâ*: the court of Exchequer held the replication bad on special demurrer, as traversing the entry, which was wholly immaterial (*h*); but the court of error held, that as the statement of the entry in the plea was immaterial, a traverse of it did not vitiate the traverse of the expulsion (*i*).

3. *Action for Use and Occupation.*

In what cases, p. 155.

By whom, p. 156.

Against whom, p. 157.

Declaration, p. 158.

Evidence for Plaintiff under the General Issue, p. 159.

Evidence for Defendant under the General Issue, p. 163.

Special Pleadings, p. 167.

In what cases.] In all cases where there is a demise, actual or implied, without deed, the landlord may recover an equivalent for the use, occupation or holding of the demised premises, by action of assumpsit or debt. Formerly this was not so: if there were a demise, the landlord must have sued in debt for rent. But by stat. 11 G. 2, c. 19, s. 14, "to obviate

(*f*) *Haldane v. Johnson*, 22 Law J. 264, ex.

(*g*) *Stevenson v. Lambard*, 2 East, 575. And see *Neale v. M'Kenzie*, 1 Mees. & W. 747.

(*h*) *Palmer et al. v. Goden et al.*, 7 Mees. & W. 480.

(*i*) *Id.* 8 Mees. & W. 890.

some difficulties that many times occur in the recovery of rents, where the demises are not by deed," it is enacted that "it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements or hereditaments held or occupied by the defendant or defendants, in an action on the case for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action, any parol demise, or any agreement (not being by deed), whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered." The action on the case, here mentioned, meant an action of assumpsit, which is an action on the case on promises. But the action of debt, also, lay for use and occupation (*k*), even although there were a demise, provided it was not under seal (*l*); and this, independently of the above statute (*m*). But where ejectment is brought against a tenant, although the lessor of the plaintiff, in such a case, may maintain an action for use and occupation, to recover the rent payable up to the time of the accruing of the title, as stated in the writ, he cannot in such action recover for the occupation beyond that time; for it would be inconsistent to treat him as a trespasser by the ejectment, and as being legally in possession by the action for use and occupation, at the same time (*n*).

Use and occupation will lie for a fishery or right of fishing in a river. Where by a written agreement the plaintiff agreed to let, and the defendant to take, a specified part of a certain fishery, at a certain rent, but he was to take the fish by angling only, and he accordingly enjoyed the use of the fishery a year,—it was holden that use and occupation would lie, to recover the rent (*o*).

By whom.] If there be a demise, the action may be brought by the lessor, or person having the immediate reversion; or by the assignee of the reversion (*p*), for rent accruing subsequently to the assignment (*q*), if he have the legal estate (*r*); or by a mortgagee of the reversion (*s*); or by the grantee

(*k*) *Stroud v. Rogers*, 6 T. R. 62, n. *Wilkins v. Wingate*, 6 T. R. 62. *King v. Fraser*, 6 East, 348. *Egler v. Marsden*, 5 Taunt. 25.

(*l*) *Gibson v. Kirk*, 1 Q. B. 850.

(*m*) *Id.*

(*n*) *Birch v. Wright*, 1 T. R. 378. See *Doe v. Batten*, Cowp. 243, 246, *semb. cont.*

(*o*) *Holford v. Pritchard*, 18 Law J. 315, ex.

(*p*) *Lumley v. Hodgson*, 16 East. 99. *Rennie v. Robinson*, 1 Bing. 147.

(*q*) *Mortimer v. Preedy*, 3 Mees. & W. 602.

(*r*) *Cobb v. Carpenter*, 2 Camp. 13, n. See *Rumball et al. v. Munt*, 15 Law J. 180, qb.

(*s*) *Rawson v. Eicke*, 7 Ad. & El. 451. See *Turner v. Cameron's Railway Co.*, 20 Law J. 71, ex.

of an annuity, to whom the lessor has conveyed the demised premises as security (*t*). But this action cannot be maintained by a *cestui que* trust, where the letting has been by the trustee (*u*); nor by any person claiming under the *cestui que* trust, such as tenant by elegit, or the like (*v*); nor by an agent of the lessor (*w*). But it will lie by the survivor of two trustees, without naming him as such (*x*). And it will lie at the suit of a corporation aggregate, as well as by an individual (*y*).

The action will lie, also, although there be but a mere agreement for a lease (*z*). So it will lie in all cases where a demise may be implied (*a*). So it will lie, although the plaintiff have parted with the whole of his interest to the defendant, if he have reserved a rent, and the defendant have agreed to pay it (*b*); or it will lie by the executor of such assignor (*c*). But it will not lie by a person merely claiming the estate, against the occupiers of it, who have never holden under him,—however good the title of such claimant may be (*d*).

Against whom.] Where there is a demise, the action will lie against the tenant, although he may have underlet, and the premises be occupied by his undertenant (*e*); and it will lie against him, even for a time his undertenant may have holden over against his consent (*f*). So, where the defendant, in expectation of a lease by indenture, which he agreed to take from the plaintiff, procured attornments from some of the tenants, and received rent from others; it was holden that he was liable to the plaintiff, as for use and occupation (*g*). But if the landlord accept of the undertenant as his tenant, and distrain upon him for rent, he cannot afterwards sue the original tenant in an action for use and occupation (*h*). The action will lie also against a person who holds over after the determination of a demise. And where it

(*t*) *Birch v. Wright*, 1 T. R. 378.

(*u*) *Morgell v. Paul*, 2 Man. & R. 303.

(*v*) *Harris v. Booker*, 12 Moore, 283.

(*w*) *Evans v. Evans*, 3 Ad. & El. 132.

(*x*) *Wheatley v. Boyd*, 21 Law J. 30, ex.

(*y*) *Dean & Ch. of Rochester v. Pearce*, 1 Camp. 463. *Mayor of Stafford v. Till*, 4 Bing. 75. *Southmark Bridge Co. v. Sills*, 2 Car. & P. 371.

(*z*) See ante, p. 156.

(*a*) See ante, p. 68.

(*b*) *Baker v. Gosling*, 1 Bing. N.

C. 19. *Pollock et al. v. Stacey*, 16 Law J. 132, qb.

(*c*) *Baker v. Gosling*, 1 Bing. N. C. 19.

(*d*) See *Cripps v. Blank*, 9 D. & Ry. 480.

(*e*) *Bull v. Sibbs*, 8 T. R. 327.

Waring v. King, 8 Mees. & W. 571.

(*f*) *Idbs v. Richardson*, 9 Ad. & El. 849.

(*g*) *Neal v. Swind*, 2 Cr. & J. 377.

(*h*) *Thomas v. Cook*, 2 B. & A.

119. *Walls v. Atcheson*, 3 Bing.

402. *Hall v. Burgess*, 5 B. & C.

332.

appeared that the plaintiff became entitled to a cottage upon the death of his mother, and that the defendant resided with the mother in the cottage until her death, rent free, but had since continued in possession and had paid no rent,—it was holden that the plaintiff might recover a compensation for the occupation since the death of the mother, in an action for money had and received (*i*). The action will lie, also, by the lessor against the assignee of the term. But where the tenant assigned all his goods, estate and effects to trustees, for the benefit of his creditors, it was holden that the lessor could not sue the trustees for use and occupation, without proving that they had actually occupied; and that their merely putting persons upon the premises, temporarily, to take care of the goods, was not such an occupation (*j*). So, if the lessee become bankrupt, the lessor may sue the assignees for use and occupation, if they actually occupy (*k*); but not otherwise (*l*). So, the executors or administrators of the lessee, are liable, as such, in this form of action (*m*); but they cannot be sued in their individual capacity, unless they have had an actual and beneficial occupation of the demised premises (*n*); and in that case the action will lie only against such of them as have so occupied (*o*). As to an action for use and occupation against a corporation, see *Finlay v. The Bristol and Exeter Railway Co.*, 21 Law J. 117, ex.; *Lowe v. The London and North Western Railway Co.*, 21 Law J. 361, qb. If partners become tenants, the whole of them continue liable until the determination of the term, although one or more may have retired from the partnership before that time (*p*). But if a house or land be let to two persons jointly, and after the determination of the demise one of them holds over without the assent of the other, an action for use and occupation will not lie against the two, but against the one alone who held over (*q*).

Declaration.] The declaration is on contract, as for a money demand, and the form is given in sched. B. to stat. 15 & 16 Vict. c. 76, No. 9, 10. The action is transitory, and the venue therefore may be laid in any county (*r*). And it is

(*i*) *Hellier v. Sillcox*, 19 Law J. 295, qb.

(*j*) *How v. Kennett*, 3 Ad. & El. 659.

(*k*) *Gibson v. Courthope*, 1 D. & Ry. 205. *Nash v. Tatlock*, 2 H. Bl. 320; and see *Lambert v. Norris*, 2 Mees. & W. 333.

(*l*) See *Clarke et ux. v. Webb et al.*, 1 Cr. M. & R. 29.

(*m*) See *Atkins v. Humphrey et al.*, 15 Law J. 120, cp.

(*n*) *Remnant v. Bremridge*, 2 Moore, 94.

(*o*) *Nation v. Tozer et al.*, 1 Cr. M. & R. 172.

(*p*) See *Christy v. Tancred*, 7 Mees. & W. 127.

(*q*) *Draper v. Crofts et al.*, 15 Law J. 92, ex.

(*r*) *Egler v. Marsden*, 5 Taunt. 25; and see *Mortimer v. Preedy*, 3 Mees. & W. 602.

unnecessary in the declaration to state the parish, &c. where the premises are situate, or to give any other local description of them (*s*); although if stated, it must be stated truly, otherwise the variance will be fatal (*t*). Nor is it necessary to state the particulars of the demise (*u*), or describe the premises otherwise than generally, as divers messuages, lands and tenements, or the like (*v*). If the holding have been under the plaintiff, it must be so stated; or if the holding have been under two, it must be so stated, although one of them have died, and the action be brought by the survivor alone (*w*).

It may be necessary to mention, that the court will not allow a count in debt on a demise, to be joined with a count for use and occupation, to recover the same rent, where the whole may be recovered under the latter count (*x*).

Form of Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—.

Middlesex to wit: J. S., the plaintiff in this suit, by A. B., his attorney [or in person], sues J. N., the

defendant in this suit, for the defendant's use, by the plaintiff's permission, of messuages and lands [or of a fishery] of the plaintiff. And the plaintiff claims £—.

General Issue.

In the Queen's Bench.

The — day of —, A.D. 18—.

J. N. } The defendant by C. D., his attorney [or in person], says that
 ats. } he never was indebted as alleged.
 J. S. }

Evidence for the Plaintiff.

Under the general issue, the plaintiff must prove—

1. That the defendant held and occupied the premises under him during the time for which rent is claimed. The words in stat. 11 G. 2, c. 19, s. 14, *ante*, p. 156, are, “held or occupied,” “held or enjoyed,” and it is necessary, by the evidence, to bring the case within one or other of them. Where there was a parol demise for two years, but the tenant never entered, the court of Exchequer held he could not be sued in this action as for use and occupation; for he neither held,

(*s*) *King v. Fraser*, 6 East, 348.

Kirtland v. Pounsett, 1 Taunt. 570.

(*t*) *Wilson v. Clarke*. *Guest v.*

Caumont, 3 Camp. 235.

(*u*) *Wilkins v. Wingate*, 6 T. R.

62.

(*v*) *King v. Fraser*, *supra*.

(*w*) *Israel v. Simmons*, 2 Stark.

356.

(*x*) *Arden v. Pullen*, 9 Moes. &

W. 430.

occupied, or enjoyed the premises (a). So, where a tenant, by a written agreement, had agreed to take premises from a future day, Patteson, J., held it not sufficient merely to put in and prove the agreement, but that evidence must also be given of some occupation under it (b). But if it be proved that the tenant took possession, for a time however short, he is liable to be sued in this action at all times afterwards, until the end of the term (c). And where the defendant agreed to rent a house, and sent in a woman to clean it, and workmen to paper one of the rooms of it, this was holden to be sufficient evidence of occupation, to go to the jury (d). Gibbs, C. J., indeed, is reported to have said, in *Whitehead v. Clifford* (e), that the action for use and occupation depends either upon actual occupation, or upon an occupation which the tenant might have had, if he had not voluntarily abstained from it. But this seems to be carrying the principle too far: a demise, of itself, before entry, gives the tenant a mere *interesse termini*, a right to enter and take possession, but gives him no estate whatever in the demised premises (f); and therefore, until entry, he cannot be said to hold, occupy, or enjoy the premises, within the meaning of these words in the statute.

Or in the case of an implied demise from year to year, or even at will, as for instance, where land is let for a term of years, and after the expiration of the term the tenant holds over, the landlord may maintain this action against him for the time he holds over (g); and where the original demise was to A. and B., and at the expiration of the term A. held over, with the assent of B., it was holden that both were liable, for such time as A. continued actually to occupy, but no longer (h). So, if a party be let into possession of land, under a contract for the purchase of it, which goes off, and he afterwards continues to hold, he is liable in this form of action for a compensation for the use and occupation of the premises, after the contract of sale had been abandoned (i); but not for the time whilst the contract for sale subsisted (k), unless there be some stipulation in the contract to the contrary. On the other

(a) *Edge v. Strafford*, 1 Cr. & J. 391. *Lowe v. Ross*, 19 Law J. 318, ex. *Towne v. D'Heinrich*, 22 Law J. 219, cp.

(b) *Woolley v. Watling*, 7 Car. & P. 610.

(c) *Jones v. Reynolds*, 7 Car. & P. 335, and see *Pinero v. Judson et al.*, 6 Bing. 206.

(d) *Smith v. Towart*, 2 Man. & Gr. 841.

(e) 5 Taunt. 519.

(f) *Ante*, p. 43.

(g) *Bishop v. Howard*, 2 B. & C. 100. *Alford v. Vickery*, 1 Car. & M. 280; and see *Waring v. King et al.*, 8 Mees. & W. 571.

(h) *Christy v. Tancred et al.*, 9 Mees. & W. 438.

(i) *Howard v. Shaw*, 8 Mees. & W. 118. *Bull v. Cullimore*, 2 Cr. M. & R. 120.

(k) *Hearn v. Tomlin*, Peake 192. *Kirtland v. Pounsett*, 2 Taunt. 145. *Winterbottom et al. v. Ingham*, 14 Law J. 298, qb.

hand, if a man sell land, but remain in possession of it, an action for use and occupation will not lie against him. And, therefore, where a tenant in common of five houses, and occupying one of them, joined his co-tenant in the sale of the five, but continued to reside for two years afterwards in the house he had occupied at the time of the sale, it was holden that these facts alone were not evidence of a tenancy, and that he could not be sued by the purchaser as for use and occupation (*l*). But if a man enter under an agreement for a lease, he is tenant at will until the lease is granted, or a tenancy from year to year can be implied; and in the meantime, he is liable in this action for the time he has occupied (*m*). So, payment of rent is a sufficient recognition of the right of a landlord to support an action for use and occupation, although it appear by the plaintiff's evidence that the defendant originally came in under another person, and that the plaintiff has but an equitable title (*n*). So any other admission of the tenancy by the tenant, either express or implied, will enable the landlord to maintain this action against him (*o*). But a judgment, in an action by the landlord for use and occupation, against A. and B., is no evidence in a subsequent action by the landlord against B. alone, for the use and occupation of the same premises for a subsequent period (*p*). So, if the vendor of premises remain in possession after the sale, it is an adverse possession, and there is nothing in it from which a tenancy can be implied, so as to enable the vendee to sue the vendor in an action for use and occupation (*q*).

If there be a demise, or an agreement for a demise, and there have been no payment of rent, or other matter from which (independently of the demise or agreement) the relation of landlord and tenant between the parties may be implied, the demise or agreement may be proved in the ordinary way. And if it appear, either from the examination or cross-examination of the plaintiff's witnesses (*r*), and not merely from evidence on the part of the defendant (*s*), that such demise or agreement was in writing, it must be produced and proved in

(*l*) *Terr v. Jones*, 14 Law J. 94, ex.

(*m*) *Kirtland v. Pounsett*, 2 Taunt. 143, per Park, B.

(*n*) *Dolby v. Ives*, 11 Ad. & El. 335.

(*o*) *Panton v. Jones*, 3 Camp. 372. *Sullivan v. Jones*, 3 Car. & P. 579. *Hill v. Ramm*, 5 Man. & Gr. 789.

(*p*) *Christie v. Tancred*, 9 Mees. & W. 438.

(*q*) *Terr v. Jones*, 13 Mees. & W. 12; 14 Law J. 94, ex.

(*r*) *Marston v. Dean*, 7 Car. & P. 13. *R. v. Ramdon*, 8 B. & C. 708. *R. v. Merthyr Tidell*, 1 B. & Ad. 29. *R. v. Wrangle*, 2 Ad. & El. 514. *Penn v. Griffiths*, 6 Bing. 533.

(*s*) *R. v. Padstow*, 4 B. & Ad. 308. *Fry v. Chapman*, 5 Dowl. 265. *Darner v. Langton*, 1 Car. & P. 108. *Reed v. Deere*, 7 B. & C. 261. *Flelder v. Ray*, 6 Bing. 332.

the regular way, being duly stamped (*u*); otherwise the plaintiff will be nonsuit. If, on the other hand, the demise be merely verbal, although the tenant is to hold on the same terms as another who holds under a demise in writing (*v*), or upon terms mentioned in any other written instrument (*w*), it is not necessary to produce or prove the written instrument. So, if the lease or agreement have been prepared, but not executed by the defendant, it is not necessary to produce or prove it (*x*).

But if an occupation by the defendant, be proved by parol evidence (*y*), and parol evidence be also given of payment of rent for the premises by the defendant to the plaintiff (*z*), or of any admission of the tenancy, express or implied, by the defendant (*a*), so as to prove the relation of landlord or tenant between them, it is immaterial whether the holding be under a written instrument or not; or if it be, the plaintiff shall not be nonsuit for not producing it.

If the plaintiff claim as assignee of the reversion,—then after proving the tenancy of the defendant under the assignor, he must prove his derivative title.

2. The plaintiff must prove the amount of compensation he ought to have, for the use and occupation of the premises, during the time for which he alleges rent to be due. If there be any demise or agreement (not under seal) wherein a certain rent has been reserved,—by stat. 11 G. 2, c. 19, s. 14, the plaintiff “may make use thereof as an evidence of the quantum of the damages to be recovered (*b*).” And this, although such demise or agreement be void by the statute of frauds (*c*), or otherwise. And the plaintiff must show that the rent was due, according to the terms of it. And, therefore, where it appeared that the premises were let to the defendant at the rent of 120*l.* a year, for a year certain from the 25th March, 1844, and from thence until determined by a six months’ notice, expiring at any quarter of a year, and use and occupation being brought for the quarter ending the 25th December, 1845, it was holden that the action would not lie, for the rent was payable yearly, and not quarterly (*d*). But where the action was brought for use and occupation of a farm, taken under an agreement, which had never been signed by the defendant,

(*u*) *Brewer v. Palmer*, 3 Esp. 213.

(*v*) *Drant v. Brown*, 3 B. & C. 665. *Turner v. Power*, 7 B. & C. 625.

(*w*) *Hey v. Moorhouse*, 6 Bing. N. C. 52.

(*x*) *Hawkins v. Warre*, 5 D. & B. 512. *Doe v. Cartwright*, 3 B. & A. 326.

(*y*) See *R. v. Holy Trinity*, Hull, 7 B. & C. 611.

(*z*) *Dolby v. Ives*, 11 Ad. & El. 335.

(*a*) *Vide supra*.

(*b*) *Vide ante*, p. 156.

(*c*) *De Medina v. Polson*, Holt, 47.

(*d*) *Collett v. Curling*, 16 Law J. 390, qb.

and the terms of which had not been fulfilled by the plaintiff, it was holden that the jury might ascertain the value of the farm, without reference to the rent reserved by the agreement (*e*). So, where the defendant continued to hold lodgings beyond the time for which he had originally taken them, it was holden that the new holding was not of necessity to be deemed to be on the same terms as the former holding, but that the jury might give a larger sum, if from circumstances they thought the landlord ought to have it (*f*). Also, if there have been no agreement between the parties, fixing the rent to be given for the premises, in that case the plaintiff must prove by witnesses the sum for which they could reasonably be let to a tenant, or, if the defendant have previously paid rent for them, the amount of rent that he paid.

Evidence for the Defendant.

The defendant under the general issue may disprove every thing which the plaintiff is bound to prove. He may prove that the premises were let to him by deed (*g*). And where an action was brought against a man for the use and occupation of lodgings by H. his wife, a plea that H. was not his wife, was holden bad on special demurrer, as amounting to the general issue (*h*). He may, it should seem, prove that the plaintiff brought an ejectment against him for the same premises, and that the present action is for rent alleged to have accrued subsequently to the date of the title in the writ of ejectment (*i*). He may also take advantage of any variance between the plaintiff's proofs, and the statement in the declaration (*k*). But this is no longer of much importance, as the judge may, and will generally, allow of the record being amended, so as to make it correspond with the evidence. And where the declaration described the premises as a messuage, land, and premises, with the appurtenances, and the evidence was of a demise of a messuage and land, together with "the furniture, utensils, and implements:" the court held this to be no variance; because the rent issued out of the realty only, and not out of the furniture, &c. (*l*). In this last case, the form of action was debt for rent; but the principle of the decision is equally applicable to the action for use and occupation.

(*e*) *Tomlinson v. Day*, 2 Brod. & B. 680.

(*f*) *Elyar v. Watson*, Car. & M. 494.

(*g*) See 11 G. 2, c. 19, s. 14, *ante*, p. 155.

(*h*) *Sinclair v. Hervey*, 2 Chit. 642.

(*i*) See *ante*, p. 156.

(*k*) See *Dean of Rochester v. Pearce*, 1 Camp. 466.

(*l*) *Farewell v. Dickenson*, 6 B. & C. 251.

If the premises were let to the defendant at a rent payable at certain periods, and before any rent was due, or before the rent sought to be recovered became due, the plaintiff evicted him; this is a good defence under the general issue, because the defendant ceased to hold or occupy the premises before any rent became due for them; and a special plea to this effect would be bad on special demurrer, as amounting to the general issue (*a*). So if he be evicted from part, and he thereupon give up the residue, this is a complete defence as to the whole (*b*); but if, instead of giving up the residue he retain it, he will then be liable to pay for it, on a *quantum meruit* (*c*). Where a tenant from year to year, at a rent payable half-yearly, quitted at the end of the current year, without giving any notice; and the landlord, before the end of the next half-year, re-let the premises to another tenant: this was holden to amount to an eviction, and that the landlord could not maintain this action against the first tenant, to recover any rent accruing subsequently to the time when he quitted (*d*). But the landlord's merely putting up a bill upon the premises, for the purpose of letting them, will not prevent him from recovering (*e*). So, where A. let lands to B., and B. underlet to others, and A. gave notice to quit to the undertenants, in consequence of which, one of them quitted the lands occupied by him, and they remained untenanted for a whole year; B. then relet them: it was holden that A. could not recover from B. the rent of the unoccupied premises for the time they were so unoccupied; for his conduct, in giving notice to quit, amounted to an eviction (*f*). If the tenant have been evicted by a stranger, and have paid the rent to him, this will be a defence; if the payment were of rent due at the time of the eviction, the defence must be specially pleaded (*g*); but if the action be for rent accruing subsequently, it may be given in evidence under the general issue (*h*).

But it must be observed, that in this action, as well as every other, a lessee will not be allowed to dispute or impugn the title of his landlord, from whom he received possession of the premises in question (*i*): he may show that his title has expired (*k*), or that before the accruing of the rent for which the

(*a*) *Prentice v. Elliot*, 5 Mees. & W. 606.

(*b*) *Smith v. Raleigh*, 3 Camp. 513.

(*c*) *Stokes v. Cooper*, 3 Camp. 514, n.

(*d*) *Hall v. Burgess*, 8 D. & Ry. 67.

(*e*) *Redpath v. Roberts*, 3 Esp. 255.

(*f*) *Burn v. Phelps*, 1 Stark. 94.

(*g*) *Newport v. Harley*, 14 Law J. 242, qb.

(*h*) *Selby v. Browne*, 14 Law J. 307, qb.

(*i*) *Fleming v. Gooding*, 10 Bing. 549. *Rennie v. Robinson*, 1 Bing. 147.

Cooke v. Loxley, 5 T. R. 4. *Balls v. Westwood*, 2 Camp. 11.

Dolby v. Iles, 11 Ad. & El. 335.

(*k*) *Neave v. Moss*, 1 Bing. 360. *England v. Slade*, 4 T. R. 682. *Doe v. Ramsbottom*, 3 M. & S. 516.

action is brought, the landlord sold or assigned his interest in the premises to another (*l*); but he will not be allowed to dispute the title of him from whom he obtained possession of the demised premises. If, however, the action be brought by an assignee of the reversion, the defendant may dispute his derivative title (*m*). And where the tenant did not receive possession from the plaintiff, but merely attorned to him during his tenancy, he is not thereby estopped from disputing his title, for he may by mistake have attorned to a person who has no title (*n*). And it should seem that he may avail himself of this defence under the general issue. *Nil habuit in tenementis* is no plea in an action for use and occupation (*o*).

Where there has been no demise, the defendant, under the general issue, may give in evidence, that the premises he occupied were burnt down; and this will be a good defence as to so much of the rent as accrued after the fire, but not as to rent due up to that time (*p*). But in strictness it is no defence, where there has been a demise (*q*).

Also, it was holden, in one case, that where a man lets a house, he impliedly undertakes that it is habitable, and free from any serious nuisance; and therefore, where a tenant, upon entering into possession of a furnished house, found it so infested with bugs that it was impossible to dwell in it, and left it, it was holden that he was liable to pay only for the time he actually occupied (*r*). But the authority of this case has since been very much shaken; and it has been holden that at all events, if the house be let upon lease, there is no such implied warranty (*s*). And the better opinion seems to be, that the only implied agreement upon the part of the landlord, is for quiet enjoyment, in the ordinary legal sense of that term (*t*).

Where a tenant held a shop and house from year to year, and the lessor, shortly before Midsummer-day, having put in workmen, with the tenant's consent, to repair the party-wall, the inconvenience was so great, that all the tenant's lodgers left him, and the tenant was obliged to procure lodgings elsewhere for himself and his family; he paid his rent up to Mid-

(*l*) *Doe v. Watson*, 2 Stark. 230.
Doe v. Edwards, 6 Car. & P. 208.

(*m*) *Phillips v. Pearce*, 5 B. & C. 433.

(*n*) *Cornish et al. v. Searell*, 8 B. & C. 476, 471. *Gravenor v. Woodhouse et al.*, 1 Bing. 38. *Gregory v. Doidge et al.*, 3 Bing. 474: and see post, tit. "Ejectment."

(*o*) *Lewis v. Willis*, 1 Wils. 314. *Curtis et al. v. Spitty*, 1 Bing. N. C. 15.

(*p*) See *Packer v. Gibbins*, 1 Q. B. 421.

(*q*) *Baker v. Holtzapffel*, 4 Taunt. 15. *Izon v. Gorton*, 5 Bing. N. C. 591.

(*r*) *Smith v. Marrable*, 12 Law J. 223, ex; 11 Mees. & W. 5.

(*s*) *Hart v. Windsor*, 12 Mees. & W. 68.

(*t*) See Dict. per Parke, B. 13 Mees. & W. 85.

summer, and continued the shop until the 5th July following, when he quitted without notice: the court held that as he had no beneficial occupation after Midsummer, an action for use and occupation could not be maintained against him for rent accruing subsequently to that time (*v*). So, where the house was not in such a reasonable and decent state of repair, as to be fit for comfortable occupation, this was holden to be a good answer to a claim for rent (*w*). So, where the defendant rented premises under a written agreement for three years, but quitted them at the end of six months, the house for want of sufficient drainage, proving unwholesome, noisome, offensive, and unfit for habitation; the plaintiff promised to build a sewer, to remedy the defect, but never did so: in an action afterwards brought by him for use and occupation, to recover rent accruing subsequently to the tenant's quitting, Bayley, B., held that if the defendant made out to the satisfaction of the jury, that the premises were noxious and unwholesome to reside in, and that this state arose from no default or neglect of his own, but from some cause over which he had no control, or none except at an extravagant or unwarrantable expense, he was not bound to remain; he was not bound to make a sewer, and if nothing else could keep the house wholesome, he was justified in quitting it (*x*). So, where in an action for the use and occupation of a house, the tenant paid into court the amount of the rent up to Midsummer, and proved that on the Sunday before Midsummer-day the wall of the privy gave way, and the filth from it flowed into the kitchens, so as to render them uninhabitable; that he immediately looked out for other premises, but was not able to remove for six weeks afterwards: *Ld. Denman, C. J.*, said that he would put it to the jury, whether the premises were fit for proper and comfortable occupation after Midsummer-day, and whether the defendant had *bonâ fide* quitted them as soon as he could procure others; whereupon the plaintiff elected to be nonsuit, and the court, in the following term, refused to set aside the nonsuit and grant a new trial (*y*). But the landlord being under an implied agreement to repair and not doing so, will not justify the tenant in quitting before the determination of the demise; he may have his remedy upon the agreement (*z*).

Also, if the landlord, by any misconduct upon his part, render the occupation of the tenant so uncomfortable, that he is obliged to quit the premises, and seek a residence elsewhere,

(*v*) *Edwards v. Hetherington*, 7 D. & Ry. 117.

(*w*) *Salisbury v. Marshall*, 4 Car. & P. 65.

(*x*) *Collins v. Barrow*, 1 Moody & R. 112.

(*y*) *Cowie v. Goodwin*, 9 Car. & P. 378.

(*z*) *Surplice v. Farnsworth*, 13 Law J. 215, cp.

it should seem that he could not afterwards recover in an action for use and occupation of the premises after the defendant had quitted them (a).

And lastly, the defendant may prove that before any part of the rent became due, he surrendered the premises in question to the plaintiff, and that the plaintiff accepted of the surrender. And where, in the middle of a quarter, the landlord accepted the key of the demised premises from the tenant, under a parol agreement that upon her giving up possession, the rent should cease; and she never afterwards occupied: it was holden that the landlord could not recover, as for use and occupation, for a time subsequent to the tenant's giving up the key (b). And in a subsequent case, where apartments in a house were let to a tenant for a year, at a rent payable quarterly, and during a current quarter, upon some dispute between them, the tenant told the landlord she should quit the lodging, to which the landlord assented, and on the tenant's leaving, accepted possession of the rooms: it was holden that the landlord could not recover rent, either for the whole of the quarter, or even for that portion of it which had elapsed before the tenant quitted; for the tenancy being put an end to before any rent became due, none was payable (c).

If the defendant would prove that he has paid the rent, he must plead the payment specially (d).

Special Pleadings.

Assignment to another.] The defendant may plead that he assigned his interest in the demised premises to another, and that the plaintiff accepted that other person as tenant in his stead (e).

Bankruptcy of defendant.] The bankruptcy and certificate of the defendant are of course a good answer to the action, as far as respects the rent due at the date of the fiat (f). But as to rent accruing subsequently, the certificate is no bar, but the bankrupt remains liable (g), unless the assignees accept the lease; or, if they decline it, then, unless the bankrupt, within fourteen days after he has had notice thereof, shall have delivered up the lease or agreement, under which he held, to the lessor, &c. (h).

(a) See *Kirkman v. Jervis*, 7 Dowl. 678, per Coleridge, J.

(b) *Whitehead v. Clifford*, 5 Taunt. 518.

(c) *Grimman v. Legge*, 8 B. & C. 324.

(d) See *post*, p. 100.

(e) See *Turner v. Hardey*, 9 Mees. & W. 7th0.

(f) 12 & 13 Vict. c. 106, s. 200.

(g) *Root v. Wilson et al.*, 8 East, 311.

(h) 12 & 13 Vict. c. 106, s. 145. *Slack v. Sharpe*, 8 Ad. & El. 306.

Conditional renting, and condition not performed.] If the agreement to pay rent, on the part of the tenant, be conditional merely upon the landlord doing something to the premises, such as furnishing them, or the like,—if the landlord have not complied with the condition, this will be a good plea in bar to the action, for the rent does not begin to accrue until the condition has been performed (*i*).

Distress for the same rent.] That the rent sought to be recovered has been already levied by distress, is a good plea to the action. But where it was pleaded that the plaintiff, before action brought, had taken and detained, as a distress for the rent, goods of sufficient value to satisfy the same: the plea was holden bad, for not showing that the rent was satisfied (*k*).

Illegality, &c.] If the premises be let knowingly for an illegal purpose, the landlord cannot maintain use and occupation for the rent. And therefore, where premises were let knowingly for the purpose of carrying on a trade prohibited by statute, it was holden that the party letting them could not recover the rent due for them, even although the trade, in fact, was not afterwards carried on there (*l*). So, if the premises were let for an immoral purpose,—if for instance, a person let a house to a woman for the purpose of prostitution (*m*), or allow her to remain in his house after he knows that she uses it for that purpose (*n*), he cannot recover the rent as for use and occupation. But if a man let lodgings to a prostitute, although known to him to be so, yet if she receive her visitors elsewhere, it will not prevent him recovering his rent (*o*).

Mortgagee, notice and claim of.] If the landlord have mortgaged his reversion, and the mortgagee have given notice to the tenant to pay the rent to him: this will be a good defence to an action by the landlord for use and occupation; and if the action be for rent which accrued due before the notice, the defence must be specially pleaded; but if for rent due after the notice, it may be given in evidence under the general issue (*p*).

(*i*) See *Mechelen v. Wallace*, 7 Ad. & El. 54, n.

(*k*) *Lear v. Edmonds*, 1 B. & A. 157.

(*l*) *Gas Light Co. v. Turner*, 9 Law J. 336, ex.

(*m*) *Girarday v. Richardson*, 1 Esp. 13.

(*n*) *Jennings v. Throgmorton*, Ry. & M. 251.

(*o*) *Appleton v. Campbell*, 2 Car. & P. 347. *Crisp v. Churchill*, 1 B. & P. 340, cit.

(*p*) *Waddilove v. Barnett*, 2 Bing. N. C. 538; and *Salmon et al. v. Matthews*, 8 Mees. & W. 827. But see *Wilton v. Dunn*, 21 Law J. 60, qb.

Payment.] If the defendant would set up as a defence to the action that he has paid the rent, he must plead the payment in the ordinary way (*q*). The jury otherwise cannot give the defendant the benefit of the payment, although it appear from the evidence that the plaintiff has admitted it (*r*).

The following may be the form of the plea :—

In the Queen's Bench.

The — day of —, A.D. 18—.

The defendant, by C.D., his attor-

ney, [or in person] says that before action he satisfied and discharged the plaintiff's claim by payment.

SECTION III.

Ejectment against a Tenant for Non-payment of Rent.

In what cases, p. 169.

Proceedings when stayed, p. 170.

Judgment for default of appearance, p. 170.

Relief in equity, p. 170.

When tenant finally barred, p. 171.

Summary mode of obtaining possession, for non-payment of rent, p. 171.

In what cases.] By stat. 15 & 16 Vict. c. 76, s. 210, in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises,—or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage,—or, in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof; which service or affixing such writ in ejectment, shall stand in the place and stead of a demand and re-entry.

If the landlord's right of entry accrue in or after Hilary or Trinity term, he may, within ten days afterwards, in all cases where the land, &c., does not lie in London or Middlesex, serve the tenant with a writ of ejectment, requiring him to appear within ten days after service; and the landlord in such a case

(*q*) See 1 Arch. N. P. 178; and see 3 Scott, N. R. 487.

(*r*) *Linley v. Polden*, 3 Dowl 780.

shall give six clear days' notice of trial before the commission day (c).

Proceedings when stayed.] If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs,—then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease (d).

Judgment for default of appearance.] In case of judgment against the defendant for non-appearance, if it shall be made appear to the court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter,—then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made (e).

Where the affidavit stated that three quarters' rent was in arrear, and that there was no sufficient distress to countervail the arrears due,—it was holden sufficient (f).

But if the defendant appear, and at the trial he obtain a verdict or the claimant be nonsuit, the defendant shall have his costs (g).

Relief in equity.] In case the said lessee, his assignee, or other person claiming any right, title, or interest, in law or equity, of, in, or to the said lease, shall, within the time aforesaid (h), proceed for relief in any court of equity,—such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into court, and lodge with the proper officer, such sum and sums of money as

(c) 15 & 16 Vict. c. 76, s. 217.
See this section given more fully,
post, p. 225.

(d) Id. s. 212.

(e) Id. s. 210.

(f) *Cross v. Jordan*, 22 Law J.
70, ex., overruling *Doe d. Powell v.*
Roe, 9 Dowl. 548.

(g) 15 & 16 Vict. c. 76, s. 210.

(h) In Sect. 211, post, p. 171.

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the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court;—and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord, what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands (i).

When tenant finally barred.] In case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed,—then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, (other than by bringing error for reversal of such judgment, in case the same shall be erroneous,) and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease;—provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed (k).

Summary mode of obtaining Possession of Premises, for Non-payment of Rent.

In what cases, and how.] If any tenant holding lands, tene-

(i) 15 & 16 Vict. c. 76, s. 211.

(k) *Id.* s. 210.

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ments or hereditaments at rack rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent [or half a year's rent (l),] shall desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent: two justices of the peace of the county, riding, &c., having no interest in the demised premises, may, at the request of the lessor or landlord, or his bailiff or receiver, go upon and view the same, and affix upon the most notorious part of the premises notice in writing on what day (at the distance of fourteen days at the least) they will return to take a second view thereof; and if on such second view the tenant or some person on his behalf shall not appear and pay the rent, or there shall not be sufficient distress on the premises, then the said justices may put the landlord or lessor into possession, and the lease to such tenant, as to such demise, shall from thence be void (m). Which provision is now extended to tenants who hold lands under any demise or agreement, whether written or verbal, although no right or power of re-entry be reserved to the landlord in case of non-payment of rent (n). As to the manner in which this is to be done within the metropolitan police district, see stat. 3 & 4 Vict. c. 84, s. 13.

Where the tenant had become bankrupt, and had quitted the premises, and his assignees had refused to take the lease, and there were no goods on the premises which could be distrained for the rent in arrear, the court held it to be a case within the meaning of the section, although the landlord knew where to find the bankrupt, and there was one of his servants upon the premises when the justices went there (o).

The following may be the form of the information or request; it need not be upon oath (p).

Berkshire, to wit: the information and request of J. S., of —, gentleman, taken this — day of —, in the year of our Lord 18—, before us J. P. and L. M., Esqrs., two of her Majesty's justices of the peace for the said county of Berks, who saith that one J. N. is tenant to him of a certain messuage, dwelling-house and appurtenances, situate at —, under a demise thereof by him the said J. S. as lessor and landlord thereof unto the said A. B. for — years, at an annual rack-rent of —; and that the said A.

B. is now in arrear for — year's rent for the said premises, and hath wholly deserted the same, and left the same unoccupied, and there is not now upon the said premises any sufficient distress to counter-vail the said arrears of rent: the said J. S. thereupon requests us the said justices (we having no interest in the said demised premises,) to go upon and view the same, and to take such proceedings thereupon in that behalf, according to the statute in such case made and provided, that he the said J. S. as

(l) 57 G. 3, c. 52.

(m) 11 G. 2, c. 19, s. 16.

(n) 57 G. 3, c. 52.

(o) *Ex p. Pilton*, 1 B. & A. 369.

(p) *Basten v. Carew*, 3 B. & C. 649.

such landlord and lessor as aforesaid, may be put into possession of the said premises. Taken before us

the justices aforesaid, at — on the day and year first above-mentioned.

The following may be the form of the notice:—

To J. N. late of —, yeoman : take notice that J. S., of —, gentleman, hath this day stated unto us, J. P. and L. M., Esqrs., two of her Majesty's justices of the peace for the county of Berks, that you J. N. are tenant to him of — [*§c. setting out the substance of the above information and request, but in the past tense and second person, to the words*] possession of the said premises; and we, as such justices as aforesaid, being willing to grant unto the said J. S. such remedy as by the statute in that behalf is provided, have hereupon now come upon the premises afore-

said, and have viewed the same, and we now hereby give you notice that we shall return to the said premises on —, to take a second view thereof; and if on such second view you or some person on your behalf do not then appear here and pay the rent aforesaid, and if there shall not then be sufficient distress upon the said premises to countervail the said arrears of rent, we shall put the said J. S., as such lessor and landlord as aforesaid, into possession of the said premises, according to the form of the statute in such case made and provided. Dated this —, &c.

Record of the proceedings.] The justices having attended to view the premises a second time, if the defendant do not then attend and tender the rent, and if there shall not be sufficient distress upon the premises to countervail the arrears of rent, the justices then give the landlord possession of the premises, and make a record of their proceedings; which record will be their justification, if the tenant shall afterwards sue them for what they may have thus done (q).

The record may be in this form:—

Berkshire, to wit: Be it remembered that on — in the year of our Lord —, at —, J. S. cometh before us, J. P. and L. M., esquires, two of the justices of our said Lady the Queen, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the said county committed, and informeth us that one J. N. is tenant [*§c., setting out the information and request, to the words*] possession of the said premises: And we, as such justices as aforesaid, being willing to grant unto the said J. S. such remedy as by the statute in that behalf is provided, do now hereupon come upon the premises aforesaid, and having viewed the same, do now hereupon affix upon the most notorious part

of the premises aforesaid a certain written notice, directed to the said J. N., wherein and whereby we give the said J. N. notice that we shall return to the said premises on —, for the purpose of viewing the same a second time, and that if on such second view he the said J. N., or some person on his behalf, do not appear here and pay the rent aforesaid, and if there shall not then be sufficient distress upon the said premises to countervail the said arrears of rent, we shall put the said J. S., as such lessor and landlord as aforesaid, into possession of the said premises, according to the form of the statute in such case made and provided.

And now at this day, to wit, on —, in pursuance of the said notice, we the said justices having returned

(q) See *Basten v. Carey*, 3 B. & C. 649; *Ashcroft v. Bourne*, 3 B. & Ad 684.

to the said premises, do now view the same a second time; but the said J. N. doth not, nor doth any person on his behalf, attend here to pay the said rent, nor is the same as yet paid, nor is there any distress upon the said premises to counter-vail the said arrears of rent: Wherefore the said several matters in the information aforesaid being duly proved to us, and we being

satisfied of the truth thereof, do hereupon put the said J. S. as such lessor and landlord as aforesaid into possession of the said premises, according to the form of the statute in such case made and provided. In witness whereof we the said justices have hereunto set our hands and seals, at —, this — day of —, in the year aforesaid.

Appeal.] The tenant, if the premises be in London, may appeal to the court of Queen's Bench or Common Pleas, or if elsewhere, then to the judges of assize for the county where they are situate; who are empowered to order restitution to the tenant, with costs, or affirm the act of the justices, with costs not exceeding 5*l.* (b).

SECTION IV.

Apportionment of Rent.

Between the executor of the lessor and the remainderman.] By stat. 11 G. 2, c. 19, s. 15, after reciting that where any lessor or landlord, having only an estate for life in the lands, tenements, or hereditaments demised, happens to die before or on the day on which any rent is reserved or made payable, such rent or any part thereof is not by law recoverable by the executors or administrators of such lessor or landlord, nor is the person in reversion entitled thereto any other than for the use and occupation of such lands, tenements, or hereditaments from the death of the tenant for life, of which advantage hath been often taken by the under-tenants, who thereby avoid paying anything for the same; for remedy whereof it is enacted, that where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, tenements or hereditaments,—if such tenant for life die on the day on which the same was made payable, the whole,—or if before such day then a proportion of such rent, according to the time such tenant for life lived of the last year or quarter of a year or other time in which the said rent was growing due as afore-

(b) 11 G. 2, c. 19, s. 17. See *R. v. Traill et al.*, 10 Law J., 57, m. *R. v. Sewell*, 15 Law J., 49, qb.

said,—making all just allowances or a proportionable part thereof respectively.

The above statute extended only to cases where the demise itself determined by the death of the tenant for life; but where the lease was good, so as to bind the remainderman, then the whole rent went to the remainderman, and there was no apportionment (c). But by stat. 4 & 5 W. 4, c. 22, s. 1, after reciting the above Act,—and that doubts had been entertained whether the provisions of the said Act applied to every case in which the interests of tenants determine on the death of the person by whom such interests had been created, and on the death of any life or lives for which such person was entitled to the lands demised, although every such case is within the mischief intended to have been remedied and prevented by the said Act,—it is enacted, that rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments, which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same, (although such person was not strictly tenant for life thereof,) or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his executors or administrators (as the case may be), be considered as within the provisions of the said recited Act.

Also, by the same statute, (4 & 5 W. 4, c. 22, s. 2,) all rents service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power, (and which leases shall have been granted after the passing of this Act)—and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions—and all other payments of every description in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods, under any instrument that shall be executed after the passing of this Act, or (being a will or testamentary instrument) that shall come into operation after the passing of this Act, shall be apportioned so and in such manner, that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office or benefice from or in respect of which the same shall be issuing or derived, or on the determination, by any other means whatsoever, of the interest of any such person,—he, and his executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments, according to the time which shall have elapsed from the com-

(c) See *Ex p. Smyth*, 1 Swanst. 337, and note; *Botheroyd v. Woolley*, 5 Tyr. 623.

mencement or last payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions and other payments being made; and that every such person, his executors, administrators and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portions of which such apportioned parts shall form part, shall become due and payable, and not before, as he would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions, and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who, if this Act had not passed, would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this Act, in any action or suit at law or in equity (*d*).

Provided, by s. 3, that the provisions herein contained shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description.

Between two or more reversioners.] If A., seised of land in fee, and possessed of other lands for a term of years, make a lease of both at an entire rent, and die: the rent shall be apportioned between the heir and the executor, according to the respective annual values of the land in fee, and of the lands for years (*e*).

So, if part of the reversion be granted away, there shall be an apportionment of the rent; for the rent being incident to the reversion, a proportionable part of it immediately passes with the grant of part of the reversion, although there be no mention of it in the grant (*f*). But the vendor and vendee of the part of the reversion, cannot apportion the rent by any stipulation in the grant, so as to bind the tenant, without his assent (*g*).

(*d*) See *Re Markby*, 4 Mylne & C. 84. *Oldenshaw v. Holt*, 12 Ad. & El. 590.

(*e*) Ro. Abr. 237. Bac. Abr. Rent, M. 2.

(*f*) *Collins v. Harding*, 13 Co.

57; Gilb. Rents, 173; and see *Ardo v. Watkins*, Cro. El. 637, 651. *Bott's case*, 7 Co. 23; Co. Lit. 147.

(*g*) *Bliss v. Collins*, 5 B. & A. 876.

Between the lessee and the reversioner.] If a lessee for life or years surrender a part of the lands demised,—or if he commit a forfeiture of part, by making a feoffment or doing waste, and lose it, the rent shall be apportioned (*h*). So, where a lease was made of lands, of which the lessor was seised in fee, and of other lands of which he was seised for his life (with a power of leasing), at an entire rent, and the lease was not well executed according to the power: upon the death of the lessor it was holden that the lease was good as far as respected the lands in fee, though bad as to the other land, for the rent might be apportioned (*i*). So, if part of the land demised be lost by the act of God, as if it be covered permanently by the sea, the tenant shall not thereby suffer, but the rent shall be apportioned; because the tenant, without any default upon his part, has been deprived of the enjoyment of part of that which was the consideration for his paying the rent; nor ought the lessor to complain, for if the land were in his own hands, he must have lost the benefit of so much as the sea covered (*k*). But if the land be burnt by wild fire (*l*), or if a house demised be accidentally burnt down (*m*), there shall be no apportionment or abatement of the rent on that account; nor will equity relieve against it (*n*). On the other hand, if the lessor evict the tenant from any part of the demised premises, there shall be no apportionment of the rent, nor shall the lessor be entitled to any rent at all, until he restore to the tenant that of which he has deprived him (*o*). But if the eviction be by a person having title paramount,—there, in debt for rent, there shall be an apportionment of the rent; and the same in covenant against the assignee of the term, the action being founded on the privity of estate, and not on the privity of contract (*p*); but in covenant against the lessee himself, where the action is founded on the privity of the contract, it is not so (*q*). Where, however, the lessee of land, upon his entering upon it, found eight acres of it in the possession of another person, entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half-a-year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder: it was holden, that although this

(*h*) Co. Lit. 148. a.; Ro. Abr. 235; Dy. 3 a.; 13 Co. 58; Moor, pl. 255.

(*i*) *Doe v. Meyler*, 2 M. & S. 276.

(*k*) Ro. Abr. 236; Bac. Abr. Rent, M. 2.

(*l*) Ro. Abr. 236.

(*m*) *Monk v. Cooper*, 2 Lord Raym. 1477; 2 Str. 763. *Earl Chesterfield v. Duke of Bolton*, Com. Rep. 627. *Belfour v. Weston*, 1 T. R. 310. *Doe v. Sandham*, Id.

705. *Izon v. Gorton*, 5 Bing. 501. *Baker v. Holtzapffell*, 4 Taunt. 45.

(*n*) *Holtzapffell v. Baker*, 18 Ves. 115. *Hare v. Grove*, 3 Anst. 687.

(*o*) Bac. Abr. Rent, M. 1.

(*p*) *Stevenson v. Lambard*, 2 East, 575.

(*q*) Id.

was not an eviction of the tenant by the landlord as to these eight acres, the tenant never having been in possession, yet the demise, as far as respected these eight acres, was wholly void, and the rent not apportionable; and that as there was no valid demise of the whole subject matter, nor any distinct rent reserved for that part of which there was a valid demise, the lessor was not entitled to distrain for the whole or any part of the rent (z).

As to the plea of eviction, in debt for rent, see *ante*, p. 152; in covenant for rent, see *ante*, p. 155.

CHAPTER II.

The Landlord's Remedies against the Tenant for other Breaches of Contract.

SECTION I.

Remedies for Breach of Covenant.

1. *Action of Covenant by the Lessor against the Lessee, for not Repairing, &c.*

Declaration.

Venue.] A. B. the plaintiff in this suit, by E. F., his attorney [or in person] sues C. D., the defendant in this suit: For that the plaintiff by deed let to the defendant a house, No. 401, Piccadilly, to hold for [seven years] from the — day of — A. D. —, and the defendant

by the said deed covenanted with the plaintiff well and substantially to repair the said house during the said term [according to the covenant]; yet the said house was, during the said term, out of good and substantial repair. And the plaintiff claims £—.

The lessee or his assignee may, of course, be sued for any breaches of the covenant occurring during his tenancy, without waiting for the determination of it (a); and the declaration in such a case may readily be framed from the above form.

In stating the breach, care must be taken to state any exception that may be in the covenant, and negative it: where the covenant was to repair, casualties by fire excepted, and the declaration set it out as a general covenant to repair, omitting the exception, the omission was holden fatal upon *non est fac-*

(z) *Neale v. M'Kenzie*, in error, 1 Mees. & W. 747. See *Watson v. Ward*, 22 Law J. 161, ex.

(a) *Luxmore v. Robson*, 1 R & A. 584; see *Pistor v. Cater*, Law J. 129, ex.

*also 9 Cr 944 - Dr
Dea. Trustees v. Reuland
Marratt v. Cotton 2 Cr 16
553*

tum, although no casualty by fire had in fact happened (*b*). Or, if the declaration, in setting out the covenant, state the exception, but do not notice it in the breach, it will be bad upon demurrer, although probably cured by verdict (*c*). So, where the covenant was to keep the premises in good tenantable repair, the same being first put into good tenable repair by the landlord, the landlord's doing so is a condition precedent to his maintaining any action for a breach of the covenant against his tenant (*d*). Care must be taken also, where there are two covenants to repair, one to repair generally, and the other within a certain time after notice, not to mix them up in the same breach, but to assign two separate and distinct breaches, one to each; otherwise the declaration will be bad upon demurrer (*e*).

Plea.

The defendant, by G. H. his attorney, says that the said house in the said declaration mentioned was not during the term therein mentioned out of good or substantial repair.

If there be two or more breaches, there must, of course, be as many pleas; and each plea must be pleaded "as to the supposed breach of covenant by the said plaintiff [firstly or secondly, &c.] above assigned." And care must be taken that each traverses the breach to which it is applicable, affirmatively or negatively, according as the breach is assigned in the negative or affirmative (*f*). Where the plea is special, it may, of course, be pleaded to one or more of the breaches, or to the declaration generally.

Evidence.

Upon issue joined on a general traverse of the breach, the plaintiff will have to prove the state of the premises, so as to show that they were out of repair, contrary to the meaning of the covenant stated in the declaration. What defects in the state of repair of the premises amount to a breach of the covenant, must in all cases depend upon the manner in which the covenant is worded, considered also with reference to the nature of the premises. It is not sufficient that the tenant keep the premises in as good a state as they were in when they were let to him; but if his agreement be to keep them in good re-

(*b*) *Brown v. Knill*, 2 Brod. & B. 305. *Tempany v. Burnand*, 4 Camp. 20.

(*c*) *Wright v. Goddard et al.*, 8 Ad. & El. 144.

(*d*) *Neale v. Ratcliffe et al.*, 20

Law. J. 130 qb.; and see *Martyn v. Clue*, 23 Law J. 147 qb.

(*e*) *Wright v. Goddard*, *supra*.

(*f*) See *Marshall v. Whiteside et al.*, 4 Dowl. 766.

pair he must do so, with reference to the class to which the premises belong (*g*). Upon a general covenant to repair and keep in repair, the tenant, however, is not obliged to put in new floors, or the like, but merely to repair the old ones, although the new floor would be the more substantial way of making the repair (*h*); if he keep the premises in substantial repair, it is sufficient (*i*). But under a covenant substantially to repair, uphold, and maintain a house, it has been holden that the tenant was bound to keep up the inside painting (*k*). And the covenant is often framed in such a way, as to oblige the tenant to do much more than he would be bound to do by the terms of the ordinary covenant to repair; and it must be construed accordingly. A mere enlargement of windows, opening external doors, taking down partitions, or making other alterations in the premises, however, cannot be deemed a breach of a covenant to keep the premises in repair (*l*); they may be waste, in the legal acceptance of the term, but they are not a breach of a covenant to repair. And the covenant must be considered as having reference to the time the lease is executed, and not to any previous time to which the *habendum* may relate, so as to include acts of the tenant between the latter time and the date of the lease, which might otherwise be deemed breaches of the covenant (*m*).

Whether, under a covenant to repair and keep in repair, the tenant is bound to rebuild the premises in case they are destroyed by fire, was at one time considered doubtful. But it is now well established that he is bound to rebuild (*n*), unless in the covenant casualties by fire be expressly excepted (*o*), or there be an express covenant by the lessor himself to rebuild in such a case (*p*).

Besides proving the want of repair, the plaintiff must prove the damage sustained by the breach of covenant complained of. The usual mode of proving this, where the term is at an end, is, by proving by surveyors or builders, &c., the sum it would take to put the premises into that state of repair in which the defendant ought to have kept them, according to the terms of his covenant (*q*). And the jury in such a case, may allow the

(*g*) *Payne v. Haine*, 16 Law J. 130, ex.

(*h*) *Soward v. Leggatt*, 7 Car. & P. 613.

(*i*) *Harris v. Jones*, Moody & Rob. 173, and see *Stanley v. Towgood*, 3 Bing. N. C. 4; *Gutteridge et al. v. Munyard et al.*, 7 Car. & P. 129; 1 Moody & Rob. 334; *Muntz v. Goring*, 4 Bing. N.C. 451.

(*k*) *Mark v. Noyes*, 1 Car. & P. 265.

(*l*) *Doe v. Jones*, 4 B. & Ad. 126.

(*m*) *Sharv v. Kay*, 17 Law J. 17, ex.

(*n*) *Bullock v. Dommitt*, 6 T.R. 650. *Digby v. Atkinson*, 4 Camp. 265.

(*o*) See *Wugall v. Waters*, 6 T.R. 488. *Packer v. Gibbins*, 1 Q.B. 421.

(*p*) See *Loader v. Kemp*, 2 Car. & P. 375.

(*q*) See *Penley et al. v. Watts et al.*, 13 Law J. 229, ex.; 7 Mees. & W. 601.

landlord, not only the actual expense of the repairs, but also some compensation for the loss of the use of the premises, whilst they were undergoing repair (*r*). But where the tenancy is still subsisting, and there is yet a considerable portion of the term remaining, the damages must be estimated, not by considering what it would cost to put the premises into proper repair, but by considering what damage the present state of want of repair is to the reversion; the former could not be a correct criterion, because the landlord, if he recovered as damages the sum necessary to put the premises into repair, is not bound to lay out any portion of it in repairing them (*s*). And where the lessor was bound by covenant to repair the "external parts" of a demised house, and the house was damaged in consequence of the house adjoining to it being pulled down, under the provisions of a local act of parliament, the party-wall giving way, and the jury gave the plaintiff, as damages, not only the sum he laid out in building the party-wall, the value of certain damage done by the wall giving way, the cost of the papering, painting, &c., rendered necessary by the rebuilding of the wall, cost of replacing fixtures, counters, &c., and the architect's charges,—but also the rent he paid for other premises whilst the wall was rebuilding, the costs of alterations necessary to enable him to carry on his business in these latter premises, and the cost of restoring those premises to their original state, after the wall was rebuilt: the court held that the plaintiff was not entitled to these three latter items of damages, because, if the defendant had rebuilt the wall, he would not have been bound to find other premises for the plaintiff during the time the wall was rebuilding (*t*). Where A. let a house to B., and B. underlet it to C.; and A. brought an action against B. for not repairing, which action B. requested C. to defend, C. insisting that the house was not out of repair; C. declined this, and B. on the faith of C.'s statement defended the action, had a verdict against him, and was obliged to pay damages and costs: it was holden that in an action against C. on his covenant, B. could not recover the costs he paid in the action, as they were not necessarily occasioned by C.'s breach of covenant (*u*). So where the lessee's term was forfeited and recovered in ejectment, by reason of the under-lessee not repairing, it was holden in an action against the under-lessee upon his covenant, that the lessee could not recover the value of his term (*v*).

(*r*) *Wood v. Pope*, 1 Bing. N. C. 467.

(*s*) *Trustees of the Schools, &c., of Worcester v. Rowlands*, 9 Car. & P. 734.

(*t*) *Green v. Eales*, 11 Law J. 63, qb.; 2 Q. B. 225.

(*u*) *Walker v. Hatton*, 10 Mees. & W. 240.

(*v*) *Clow et al. v. Brogden et al.*, 2 Man. & Gr. 30. *Logan v. Hall et al.*, 16 Law J. 252, cp.

Special Pleas.

For the special pleas in covenant generally, see 1 Arch. N. P. 2 Ed. p. 370. It is only necessary here to mention, that an eviction from part of the demised premises cannot be pleaded in bar of an action of covenant for not repairing, or for assigning or underletting, or the like (*v*), as it may in an action forrent (*w*).

2. *Action of Covenant in other Cases.*

A declaration in covenant, in other cases than for non-payment of rent, and for not repairing, may readily be framed from the form, *ante*, p. 178. As to the law upon the subject, with respect to waste, see *ante*, p. 106; as to not insuring, see *ante*, p. 106; as to assigning or underletting, &c., see *ante*, p. 107; and as to other acts, &c., see *ante*, pp. 109, 110.

3. *Action of Covenant by the Assignee of the Lessor against the Lessee.**Declaration.*

Venue:] A. B., the plaintiff in this suit, by E. F., his attorney, [*or in person*] sues C. D., the defendant in this suit: For that L. M. by deed let to the defendant a house, No. 401, Piccadilly, to hold for [seven] years from the — day of — A. D. —, and the defendant by the said deed covenanted with the said L. M. and his assigns well and substantially to repair the said house during the said term, [*according to the covenant*]; And afterwards the said L. M., during

the said term, by deed dated the — day of — A. D. — granted and assigned to the plaintiff all his right, title and interest in the said house, and the plaintiff thereupon became and was seised of the reversion of and in the said house: Yet the said house was, during the said term, and after the plaintiff became so seised as aforesaid, and still is, out of good and substantial repair. And the plaintiff claims £ —.

If a reversioner assign his reversion, the assignee may maintain covenant for a breach of any covenant running with the land, against the lessee (*x*), or against the assignee of the term (*y*). And if the reversion be assigned to tenants in common, each may maintain covenant against the lessee or his

(*v*) *Newton v. Allin*, 10 Law J. 179, qb.; 1 Q. B. 518.
(*w*) *Ante*, p. 152.

(*x*) 1 Saund. 237. See Bro. Sum. & Sev. 6.

(*y*) 3 Mod. 337, 338; 1 Show. 199; Carth. 182; 1 Salk. 80, 81.

assignee for his portion of the rent (*z*), or for not repairing, &c. So, the assignee of the reversion of part of the premises may maintain covenant against the lessor or his assignee, for not repairing (*a*), or for rent, &c. So, the assignee of the term may have an action of covenant against the lessor or his assignee, for a breach of any covenant running with the land (*b*); and a declaration in such a case may readily be framed from the form above given. And the same of a devisee, to whom a reversion or term is devised (*c*).

Covenant by the assignee of the reversion against the lessee, is transitory, and the venue may be laid in any county; for although not between the original contracting parties, yet as the stat. 32 H. 8, c. 34, transfers the privity of contract as to covenants to the assignee, he may bring his action in any county, in the same manner as the lessor might (*d*). But covenant by the assignee of the term against the lessor or the assignee of the reversion, is local, and must be brought in the county where the land lies (*e*).

In covenant by the assignee of the reversion, the declaration must state the lessor's title to the demised premises, that it may appear he had such an estate in the reversion as might be legally assigned to the plaintiff (*f*); then the demise, and the covenant which has been broken; then the mesne assignments of the reversion, from the time of the making of the lease, until it became vested in the plaintiff; and lastly, the breach of covenant. And although in an action *against* an assignee it would be sufficient to state his title shortly thus, that "*all the estate, right, title and interest of the said J. S., of, in, and to the said [demised premises] afterwards, to wit, on —, by assignment came to the said defendant,*"—yet in an action *by* an assignee of the reversion, this would not be sufficient, for he is deemed to know his own title, and to be capable of setting it out; and for this reason the assignment to him, and all mesne assignments (if any) between the original party from whom he has derived title and him, must be pleaded in the ordinary manner, as deeds usually are, otherwise it would be erroneous (*g*); such derivative title cannot be presumed in covenant, as it may be in ejectment (*h*). And the party suing must appear to derive title immediately

(*z*) *Henniker v. Turner*, 6 D. & R. 72.

(*a*) *Trenam v. Pickard*, 2 B. & A. 106.

(*b*) *Cro. El.* 373, 436. *Moor*, 419, 5 Co. 17, a.

(*c*) See *Kindon v. Nottle*, 4 M. & S. 53.

(*d*) 1 Saund. 237, 244, b; 1 Lev. 259.

(*e*) 5 Co. 17, a; F. N. B. 146, c.

(*f*) *Clift. Ent.* 213, pl. 7; 1 Saund. 231, 234, n; 2 Ld. Ent. 132, 135. See *Harris v. Beavan*, 4 Bing. 646.

(*g*) *Cro. Car.* 143, 3 Lev. 153. *Mackay v. Macreth*, 3 Chit. 48.

4 Doug. 213.

(*h*) See *Doe v. Baxter*, 3 W. Bl. 1228.

or mediately from the person with whom the covenant sued upon was made, and, therefore, where mortgagor and mortgagee joined in a lease of the mortgaged premises, but the lessee's covenants were with the mortgagor alone, it was holden that the assignee of the mortgagee could not sue the lessee for a breach of any of the covenants contained in the lease (*n*).

Pleas, &c.

Besides the ordinary pleas which a tenant may plead in an action of covenant against him by his immediate lessor, and which have already been sufficiently noticed in the preceding parts of this work, the defendant may put in issue the whole or any part of the plaintiff's derivative title. And in doing so he need not put in issue the execution of the different title deeds mentioned, but he may traverse generally, that L. M. did not grant or assign, &c. *modo et formâ*, according to the allegations used in stating the conveyances, and conclude each plea to the country (*o*). He cannot, indeed, impugn his own lessor's title; he cannot plead *nil habuit in tenementis* (*p*), or plead that the lessor had but an equitable estate, for that is equivalent to pleading *nil habuit in tenementis* (*q*); nor can he by his plea show that the lease was not duly executed in pursuance of a power (*r*), or the like, or in any other manner impeach it. But he may traverse the statement of the title of the lessor, in the commencement of the declaration (*s*). And where, in an action of covenant for non-payment of rent, on an indenture of lease by husband and wife, and under the seal of the wife, according to the provisions of the stat. 32 H. 8, c. 28, s. 3, the declaration stated that the husband and his wife (since deceased) demised the premises to the defendant for twenty-one years, and that he covenanted to pay rent to the husband and wife, and the heirs of the wife, and that after her death certain rent accrued due to the husband; and the defendant pleaded that the husband never had any thing in the premises but in right of his wife, whose estate they were, and that she died before the rent in question became due, and without issue, and that her heir-at-law threatened to eject the

(*n*) *Webb v. Russell*, 3 T. R. 393.

(*o*) *Bro. Estraunger al fait*, pl. 4, 6, 13, 16.

(*p*) *Parker v. Manning*, 7 T. R. 537. *Wilkins v. Wingate*, 6 Id.

62. *Style v. Herring*, Cro. Jac. 73. *Kemp v. Goodall*, 1 Salk. 277.

(*q*) *Blake v. Foster*, 8 T. R. 487; and see *Palmer v. Elkins*. 2 Str. 818.

(*r*) *Bringloe v. Goodson*, 5 Bing. N. C. 730.

(*s*) *Carvick v. Blagrave*, 1 Brod. & B. 531.

defendant, unless he should attorn tenant to him, and that he accordingly did attorn; this was holden to be a good plea (t).

4. Action of Covenant by the Lessor, against the Assignee of Lessee.

Venue:] A. B. the plaintiff in this suit, by E. F. his attorney [or in person] sues C. D. the defendant in this suit: For that the plaintiff by deed let to K. O. a house, No. 401 Piccadilly, to hold for [seven] years from the — day of — A.D. —, and the said K. O. by the said deed for himself and his assigns covenanted with the plaintiff well and substantially to [repair the said

house, or as the covenant may be]. And afterwards during the said term all the estate, right, title and interest of the said K. O., in and to the said house and term, came to and vested in the said defendant by assignment: Yet [the said house was during the said term and after the said assignment out of good and substantial repair]. And the plaintiff claims £—.

The lessor or his assignee may maintain covenant against either the lessee or his assignee, at his election, upon any covenant running with the land (u), such as a covenant to repair (v), or the like; and he may bring the action against the assignee, even before he has taken possession (w). So, covenant for rent has been holden to lie against the mortgagee of a term, to whom the lease had been assigned by way of mortgage, although he never entered or took actual possession (x). So, the lessor or his assignee may have covenant against the executor or administrator of the lessee, and may declare against him as assignee (y). So, the lessee may have covenant against the assignee of the reversion, for the breach of any covenant running with the land (z); so may the assignee of the term (a); and the declaration may readily be framed from the above form. So, of course, the lessee may maintain covenant against his own assignee of the term, for a breach of any of the covenants in the assignment (b). But no action will lie by the lessor or his assignee, against the assignee of the term, for any breach of covenant happening after such

(t) *Hill v. Saunders*, in error, 4 B. & C. 529, 2 Bing. 112.

(u) *Cro. Jac.* 309, 521, 522; 5 H. 7, 19 a; 3 Co. 22 b; *Carth.* 182, 183; 3 Mod. 337, 338; 1 Show. 199; 2 Id. 134; 1 Salk. 80, 81; 1 Saund. 240.

(v) *Martyn v. Clue*, 22 Law J. 147, qb.

(w) *Walker v. Reeves*, 2 Doug. 401, n.

(x) *Williams v. Bosanquet*, 1

Brod. & B. 238. *Burton v. Barclay*, 7, Bing. 745.

(y) *Tilney v. Norris*, *Carth.* 319. *Wollaston et al. v. Hakewill*, 10 Law J. 303, cp.

(z) 1 Saund. 237.

(a) *Cro. El.* 373, 436; *Moor*, 419.

(b) See *Burnett v. Lynch*, 5 B. & C. 589. *Stone v. Evans*, *Peake*, Ad. Ca. 94. *Steward v. Wolveridge*, 9 Bing. 60. *Wolveridge v. Steward*, 1 Car. & M. 644.

assignee shall have assigned the term over to another (c). Also, for breach of a covenant not running with the land, an assignee cannot be sued (d). Care must be taken also, that the person sued be the assignee of the term, and not an under-lessee merely; for the lessor or his assignee cannot maintain covenant against the lessee of their lessee, as there is no privity whatever, either of contract or of estate, between them (e).

Covenant against the assignee of the term is local, and must be laid in the county where the land lies (f). And the same as to covenant by the assignee of the reversion against the assignee of the term (g). On the other hand, covenant by the lessee against the assignee of the reversion, is transitory, and may be brought in any county (h); but covenant by the assignee of the term against the assignee of the reversion, is local, and must be brought in the county where the land lies (i).

In stating the assignment to the defendant, it is not necessary to show in what manner he acquired his title, for the plaintiff is not presumed to know anything about it; it is sufficient to state, generally, that all the estate, &c., of the original party came to the defendant by assignment, as in the above form, although there may have been several mesne assignments.

Pleas, &c.

Besides the pleas the lessee might have pleaded, his assignee may deny the assignment to him. But he cannot deny the title of the lessor; he is as much estopped in this respect by the indenture as his lessee was. And therefore where, to a declaration in covenant by a lessor against the assignee of the lessee, the defendant pleaded that the plaintiff did not demise *modo et formâ*, the plea was holden bad on demurrer (k). And where the defendant pleaded that the lease was not signed by the lessors or any agent for them: the plea was holden bad (l). He may plead, however, that before the breach complained of

(c) *Chancellor v. Poole*, 2 Doug. 764. *Walker v. Reeves*, Id. 461, n., Bul. N. P. 159. *Paule v. Nurse*, 8 B. & C. 486. *Taylor v. Shum*, 1 B. & P. 21. *Barnfather v. Jordan*, 2 Doug. 452. *Odell v. Wake*, 3 Camp. 394. *Hartshorne v. Watson*, 5 Bing. N. C. 477.

(d) See 1 Arch. N. P. p. 357. *Grescot v. Green*, 1 Salk. 199. *St. Saviour's v. Smith*, 1 W. Bl. 351; Bul. N. P. 159. *Grey v. Cuthbertson*, 2 Chit. 482.

(e) *Halford v. Hatch*, 1 Doug. 183.

(f) Carth. 182, 183; W. Jon. 43; 1 Wils. 165.

(g) 3 Mod. 337, 338; 1 Show. 199; Carth. 182; 1 Salk. 80, 81.

(h) 1 Saund. 237, 244 b, 1 Lev. 259.

(i) 5 Co. 17 a, F. N. B. 146 c.

(k) *Taylor v. Needham*, 2 Taunt. 278.

(l) *Aveline et al. v. Whisson*, 12 Law J. 58, cp.; 4 Man. & Gr. 801.

he assigned all his interest in the term to another; and in this case it is necessary to plead the assignment in the ordinary way, that is to say, if it have been by deed it is usually pleaded as other deeds (*m*); or if it be by a mere note in writing, it may be pleaded in like manner, but without reference to the writing (*n*); and indeed in neither case is it necessary to state the assignment to be by deed or writing, although it must appear in evidence to be so (*o*). Where to a plea of this kind, the plaintiff replied that in and by the indenture, the lessee for himself, his executors, administrators, and assigns covenanted that he, his executors or administrators, should not assign without the consent of the lessor, and that no such consent was given: the replication was holden to be bad; this action was founded on the privity of estate, and that privity was destroyed by the assignment; the proper remedy for the plaintiff was, by action on the covenant not to assign (*p*). The following may be the form of the plea, that the term did not come to the defendant by assignment.

Plea, Defendant not Assignee.

The defendant, by G. H. his attorney, says that the estate, right, title, and interest of the said K. O. in and to the said house and term, did not come to or vest in him the defendant, in manner and form as in the said declaration is above alleged.

Where in covenant against an assignee, for not repairing, the defendant pleaded that at one period he was possessed of an undivided sixth part, at another of a third, of the premises by assignment, as tenant in common with others, but had no other or greater interest: the plea was holden clearly bad, as showing that the defendant had by the assignment an undivided share in the whole of the premises, and was therefore liable for the repair, unless he showed that others were jointly liable with him; he ought to have pleaded in abatement (*q*).

Evidence.

Under this plea, it is incumbent on the plaintiff to prove that the defendant is assignee of the term; and this he may do, either by proving the deed of assignment, if he have the means of doing so, or (which is much more usual) giving evidence from which it may be presumed, such as the occupa-

(*m*) See the form, 1 Saund. 56; 2 Saund. 21; and see *post*, p. 180.

(*n*) See the form, 2 Saund. 418.

(*o*) 1 Saund. 234, n. 3.

(*p*) *Paul et al. v. Nurse et al.*, 8 B. & C. 486.

(*q*) *Merceron v. Dowson*, 5 B. & C. 479.

tion of the premises by the defendant, his exercising acts of ownership over them, or the like. Where a trustee, to whom the leases of two houses were assigned in trust for securing an annuity, said to the occupier of one of the houses, "you must pay the rent to me, I am landlord for my client who has the annuity, and you must pay the ground rents to me:" this declaration was holden to be good evidence to charge the trustee, as assignee of the term, in covenant for non-payment of rent and for not repairing (*h*). Also, showing that the defendant occupies the premises, or receives the rents or profits of them, as heir (*i*), or executor or administrator (*k*), of the lessee, will support a count against him as assignee. It may be mentioned here, that it is immaterial that the lessee shall have reserved rent to himself from the defendant, by the deed or instrument under which the defendant holds; if by that instrument he has parted with the whole of the term he had in the premises, it is in law an assignment, and the assignee liable upon the covenants in the original lease (*l*).

On the other hand, the defendant may, it should seem under this plea, prove that he is an undertenant, and not an assignee of the term (*m*).

5. Declaration, by the Assignee of the Reversion against the Assignee of the Term.

This can readily be framed from the forms in the preceding pages. After stating the demise and the covenant, it then states the derivative title of the plaintiff and the assignment to the defendant, in their order in point of time, as stated in the forms, *ante*, pp. 182, 185; and, lastly, it states the breaches of covenant complained of, and concludes in the ordinary way.

This action may be brought on all covenants running with the land (*n*). The venue is local, and must be laid in the county where the lands lie (*o*). The evidence necessary to support it, may be collected from the third and fourth of the preceding heads, *ante*, pp. 182, 185.

(*h*) *Gretton v. Diggles*, 4 Taunt. 776.

(*i*) *Derisby v. Custance*, 4 T. R. 75.

(*k*) *Tilney v. Norris*, Carth. 319. *Wollaston et al. v. Hakewill*, 10 Law J. 303, cp.

(*l*) *Wollaston et al. v. Hakewill*, *supra*.

(*m*) See *ante*, p. 186.

(*n*) 1 Arch. *Nisi Prius*, 2nd ed. p. 356.

(*o*) 3 Mod. 337, 338; 1 Show. 199; Carth. 182; 1 Salk. 80, 81.

6. *Declaration, by the Assignee of the Term against the Assignee of the Reversion.*

Venue:] C. D. the plaintiff in this suit, by G. H. his attorney, sues A. B. the defendant in this suit: For that L. M. by deed let to K. O. the house No. 401, Piccadilly, to hold for [seven] years from the — day of —, A. D. —, and the said L. M. by the said deed covenanted with the said K. O. [*here set out the covenant shortly*]; afterwards and during the said term the said

K. O. by deed dated the —, assigned all his right, title, and interest in the said house and term to the plaintiff, and all the right, title, and interest of the said L. M. of and in the reversion of and in the said demised premises came to and vested in the defendant by assignment: Yet [*&c., stating the breach.*] And the plaintiff claims £—.

This action may be brought on all covenants by a lessor which run with the land (*p*). The venue is local, and must be laid in the county in which the land lies (*q*). The evidence necessary to support it may be collected from the preceding pages upon this subject.

7. *Ejectment for a Forfeiture, by Breach of Covenant.*

We have already considered the subject of forfeiture, in what cases the landlord may enter, or (in other words) maintain an ejectment against his tenant by reason of it, and in what cases the landlord will be deemed to have waived the forfeiture. See *ante*, p. 100, &c. As to forfeiture by non-payment of rent, see *ante*, p. 105; for not repairing, *ante*, p. 105; for waste, *ante*, p. 106; for not insuring, *ante*, p. 106; for assigning or underletting, &c., *ante*, p. 107; for other acts, &c., *ante*, pp. 109, 110. As to ejectment for a forfeiture in non-payment of rent, the subject has been fully noticed, *ante*, p. 169; we shall, therefore, here confine our attention to the action for a forfeiture in other cases.

The writ and proceedings are the same as in ordinary cases.

Evidence.

[*In ejectment for not repairing.*] The evidence on the part of the lessor of the plaintiff will be—

1. The tenancy; the proviso or condition for re-entry for not repairing; and the local situation of the premises, as described in the declaration.

(*p*) 1 Arch. N. P., p. 356.

(*q*) 5 Co. 17, a.; F. N. B. 146, c.

2. The state of repair of the premises ; the notice, and service thereof, when necessary, and that the lessee has not repaired (z).

The court have no power to stay the proceedings in ejectment for not repairing, upon any undertaking to put the premises in repair (a).

For waste.] Where by a proviso in a lease, a right of entry is reserved to a lessor, in case his lessee commits waste, it is generally construed to mean such waste as may be injurious to the reversion, and not merely such as might be given in evidence under the old writ of waste, unless there be some stipulation in the lease, &c., to the contrary (b).

The evidence is similar to that under the last head.

For not insuring.] Where by a proviso in a lease, the lessor has a right of re-entry for any breach of a covenant to insure the demised premises,—if the lessor bring ejectment for a forfeiture, he must prove—

1. The tenancy ; the proviso or condition for re-entry, for not insuring ; and the local situation of the premises as described in the declaration.

2. The breach of the covenant to insure ; the onus of proving which is, in this case, upon the plaintiff (c). If the covenant be to insure in any particular office, the breach may be proved by any clerk in the office, who may have searched in the books for the insurance ; or if the lessee have insured, but have failed to continue the payment of the premium, it may be prudent to have the book of the company produced, in which the payment would appear, if it had been made. But if the covenant be to insure generally, without mention of the company with which the insurance was to be effected, the proof is more difficult ; it is not sufficient to serve the defendant with notice to produce the policy, and call upon him at the trial to produce it accordingly ; for the only effect of that will be, that upon his not producing it, the plaintiff will be allowed to go into secondary evidence of it (d). If, indeed, the action be defended by an underlessee, you may call the lessee as a witness, and oblige him to produce the policy, if he have one, or to admit that he did not insure ; but if the lessee defend, then after giving him notice to produce the policy, you must give the best secondary evidence you can collect,—his admissions, express or implied, proof of applications to him to show the policy, and his answers, and the like (e).

(z) See *ante*, p. 105.

(a) *Doe v. Asby*, 8 Law J. 207, qb.

(b) See *Doe v. Bond*, 5 B. & C. 885 ; *ante*, p. 106.

(c) *Doe v. Whitehead*, 8 Ad. & El. 571.

(d) *Id. supra*.

(e) See *ante*, p. 106.

For assigning or underletting, &c.] In order to maintain the ejectment in this case, the lessor must prove—

1. The tenancy; the proviso or condition for re-entry for assigning, &c., without licence; and the local situation of the premises as described in the declaration.

2. The assignment or underletting which is alleged to be the breach of the covenant or condition. This may be done either by causing the deed to be produced and proved by which the assignment, &c., was made, or by proving another person to be in the occupation of the premises, which will be good *prima facie* evidence of an assignment or underletting (*f*). But where it was proved that the premises were in possession of a stranger, and that he declared that they were demised to him by another stranger: this was holden not to be sufficient (*g*).

SECTION II.

Landlord's Remedy for Breaches of Contract not under Seal.

Express contracts.] Contracts not under seal, between landlord and tenant, are express or implied. Express contracts contain the stipulations under which the tenant holds the demised premises; and if he be guilty of a breach of any of these stipulations, the landlord may maintain an action on the contract against him, to recover damages for the breach.

The usual way of declaring on one of these contracts, whether it be in writing or not, is, to set it out shortly, and then to assign a breach. And care must be taken to state the agreement correctly: where it was stated as an agreement to farm the lands in a husbandlike manner, and the agreement proved was, to keep the lands constantly in grass, it was holden to be a fatal variance (*h*). But where the agreement stated was, that the defendant was to leave the furniture and linen of the house clean, and the proof was, of a promise to leave them as he found them, but it was also proved that they were clean when he first took possession: the court held it to be sufficient (*i*). And where the agreement stated was, to leave the premises in the same state in which they were at the commencement of the tenancy, and the written agreement given in evidence, was to leave them in the state they then were,—the premises being then in the possession of another tenant, and the defendant's tenancy was not to commence for a month

(*f*) *Doe v. Rickarby*, 5 Esp. 4.

(*h*) *Saunderson v. Griffiths*, 5

(*g*) *Doe v. Payne*, 1 Stark. 86.

B. & C. 909.

See *ante*, p. 107.

(*i*) *Stanley v. Agnew*, 12 Mees. & W. 827.

afterwards, yet the court held it to be sufficient (*k*). Where there was an agreement between the plaintiff and the defendant, the plaintiff to let, and the defendant to take, a house for three years, from the 25th December, 1839, at the yearly rent of 30*l.* payable quarterly, and the defendant, (amongst other things) thereby agreed to keep the premises in as good repair and condition as the same then were, and to leave them so on the determination of the tenancy, fair wear and tear excepted; the tenant however quitted the premises on the 29th September, 1841:—in an action of assumpsit upon the agreement, for two quarters' rent due the 25th March 1842, the defendant pleaded that the house, by reason of the badness of the materials with which it was built, &c. and by and through the neglect and default of the plaintiff, and not for want of any such repair as the defendant was bound to do under the agreement, became so ruinous, unsafe and unfit for habitation, that he was obliged to quit it, before the rent in question began to accrue; this was traversed by the replication, which also alleged that the premises became in the state mentioned in the plea for want of the repairs the defendant was bound to do by the agreement, and by and through the default of the defendant: At the trial, the defendant proved that by reason of the house being built in a marsh, and upon a bad foundation, the walls had sunk, and there were large gaps in them, so that they were obliged to be shored up, and the basement was so full of water, that pumping for several hours a day became necessary, and even then it was so wet, as to be utterly unfit for habitation; the jury having given a verdict for the defendant, the court upon application granted a new trial: they held that the plea and the proof of it, were no reasons why the tenant should not pay the rent during the term; he might have examined the house before he took it, and his not having done so, or not having done so effectually, was his own fault; and as to the landlord, he was under no agreement, express or implied, to make any repairs, nor had he, expressly or impliedly, warranted the house to stand during the term (*l*). And in another case, where the tenant of a farm, having a sale of his live stock, a neighbouring farmer purchased two cows at it, and by the permission of the tenant left them on the farm for some weeks, bringing provender from his own farm to feed them: the manure made by these cows was holden to be manure made on the farm, and the carrying of it away, a breach of the condition of a bond whereby the tenant stipulated with his landlord that he would "put and spread all the manure and compost there collected in the middenstead, or on any other part of the farm, on the meadow land, and would not

(*k*) *White v. Nicholson*, 4 Man. & Gr. 95.

(*l*) *Arden v. Pullen*, 10 Mees. & W. 321.

sell, cart or convey away any dung, compost or manure from the said farm (n)."

Implied contracts.] Some contracts between landlord and tenant are implied by law, some by custom. This subject has already been mentioned (n); but we shall here treat of it a little more in detail. The remedy for breach of these implied contracts is the same precisely as upon express contracts of the same description, namely, by action on the contract; and the declarations are framed in the same way as if the contracts had been made matters of special agreement between the parties. In the case of contracts implied from the custom of the country, the action on the case is sometimes adopted; and the declaration then sets out the custom, the duty of the defendant thereupon, and the breach (o). But an action on the contract is the more correct form of action, in such a case; because the custom is deemed to be engrafted upon, and to form part of, the agreement between the parties, and both together are treated as if they formed one express contract. I shall now notice the principal contracts which are implied between landlord and tenant.

As to the Terms of a Tenancy.

It has been already stated, that where a man occupies premises under an agreement, or under a void lease,—or continues to hold over and pay rent, after a former lease has expired,—the law implies that he holds under the terms and stipulations contained in such agreement or lease, as far as they are applicable to his present tenancy (p). Where a tenant for life made a lease for years, and died before the expiration of the term, but the remainderman continued to receive rent from the lessee for two years afterwards: it was holden that this was evidence from which the court would presume an agreement between the remainderman and the lessee, that the latter should continue to hold according to the terms of the original demise; and Wilson, J., said, that if there had been covenants in the original lease for particular modes of husbandry, and the tenant had neglected to perform them, the remainderman might have maintained an action against him, stating the covenants, and then averring an agreement to perform them, of which agreement the continuing to pay rent would be good evidence (q). So, if a landlord make a lease by parol for

(m) *Hindle v. Pollitt*, 6 Mees. & W. 662. *Hartley v. W. 529.*

(n) *Ante*, p. 71.

(o) See *Hallifax v. Chambers*,

4 Mees. & W. 662.

Hartley v. Burkhitt, 4 Bing. N. C. 687.

(p) *Ante*, pp. 68, 69.

(q) *Roe v. Ward*, 1 H. Bl. 97.

seven years, and which of course is void by the statute of frauds, still the tenant, if he pay rent, will be deemed to hold under the terms of the lease, with the exception of his being merely tenant from year to year (*q*). So, where a man was let into possession of a farm and paid rent, under an agreement for a future lease for fourteen years, which was to contain a covenant (amongst others) against taking successive crops of corn from the land, and a proviso for re-entry for breach of any of the covenants; the lease was not in fact granted; but the tenant having taken successive crops of corn from the farm, and which would have been a breach of the covenant if the lease had been executed, the lessor brought an ejectment: and it was holden that he had a right to recover; until the lease should be executed, the tenant held as tenant from year to year, subject to the terms and conditions which by the agreement were to be embodied in the lease, and being guilty of a breach of one of them, the landlord had a right to re-enter (*r*). So, where a tenant occupied premises under a special agreement, which was to be the basis of a future lease, and the agreement contained a provision (among others) that he should keep the premises in tenantable repair: it was holden that the landlord might maintain *assumpsit* generally against the tenant for not keeping the premises in repair, without setting out the special agreement in the declaration (*s*). But no special contract, as to cultivation, is to be implied from the mere fact of holding over without payment of rent (*t*).

In the case of holding over, the declaration may either set out the covenant in the former lease, the holding over, and then a promise to perform the covenant, as mentioned by Wilson, J., in *Roe v. Ward*, 1 H. Bl. 99, *supra*; or, which is infinitely better, it may state that the defendant was tenant of the premises to the plaintiff, and in consideration thereof promised to do so and so. And this latter mode of declaring, should be adopted in the other cases above mentioned.

As to the Payment of Rent.

If a man take a house, under an agreement, for a term of years, "at and under the rent of 80*l*," the law implies a promise upon his part to pay that rent; and if, by the agreement, there be a power reserved to the landlord to re-enter, for a breach of "any of the agreements therein contained," it ex-

(*q*) *Doe v. Bell*, 5 T. R. 471.

(*s*) *Colley v. Streeton*, 2 B. & C.

(*r*) *Doe v. Amey*, 12 Ad. & El. 273.

476.

(*t*) *Kimpton v. Eve*, 2 Ves. & B. 349.

tends to the non-payment of this rent, and the landlord may recover the premises in ejectment, although there be no express agreement to pay the rent (*u*).

As to managing a Farm according to the Custom of the Country, &c.

If a farm be let to a tenant, whether by writing or parol (*v*), without any stipulation how he is to manage it, the law implies a promise upon his part that he will cultivate and manage it in a good and husbandlike manner, and according to the custom of the country (*w*). The mere fact of the tenancy raises this implication. So, a court of equity will grant an injunction to restrain a tenant from year to year, under a notice to quit, from removing straw, hay, manure, &c., contrary to the custom of the country (*x*); and the same, as to other tenants, immediately before the expiration of their tenancy. But in all such cases, if there be an express agreement between the parties, upon the same subject as that which is thus implied from the custom of the country, the former supersedes the latter, as far as it is inconsistent with it (*y*).

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—.

Middlesex to wit: A B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the defendant heretofore, to wit, on —, was tenant to the plaintiff of a certain farm, situate, &c.; and in consideration thereof, the defendant then undertook and faithfully promised the plaintiff to [manage, use and cultivate the said farm, during the said tenancy, in a good husbandlike manner, and according to the custom of the country where the said farm, lands, and premises were so situate as aforesaid.] But the defendant after the making of his said promise and undertaking, and during the continuance of the said tenancy, to

wit, in the successive years of our Lord — and — [wrongfully and injuriously overcropped the said farm, and cropped, planted and sowed divers, to wit, — acres of the said farm, with divers, to wit, two successive crops of wheat, barley, peas, beans, tares and oats, that is to say, — acres part thereof with wheat, — acres other part thereof with barley, — acres other part thereof with peas, — acres other part thereof with tares, and the residue thereof with oats, the same, according to the course of good husbandry, then and there being excessive and unreasonable crops for the said land], and contrary to the course of good husbandry and the custom of the country where the said farm, lands

(*u*) *Doe v. Kneller*, 4 Car. & P. 3.

(*v*) *Wilkins v. Wood*, 17 Law J. 319, qb.

(*w*) *Powley v. Walker*, 5 T. R. 373.

(*x*) *Onslow v. —*, 11 Ves. 173.

(*y*) *Roberts v. Barker*, 1 Cr. & M. 808. *Clarke v. Royston*, 14 Law J. 143, ex.

196 *Implied Contract as to Management of Farms.*

and premises were so situate as aforesaid.

Further breach.] And the plaintiff in fact further saith, that the defendant, during the continuance of the same tenancy, to wit, on — aforesaid, and on divers other days and times between that day and the — day of — [took and carried away off and from the said farm, lands and premises, divers large quantities, to wit, two hundred cart loads of hay, two hundred cart loads of straw, two hundred cart loads of soil, two hundred cart loads of dung, two hundred cart loads of compost, and two hundred cart loads of manure, which had arisen and been made on the said farm, lands and premises during the said tenancy, and spent and consumed the same elsewhere than on the said farm, lands and premises, or any part thereof:] contrary to the course of good husbandry and the custom of the country where the said farm, lands and premises were so situate as aforesaid.

Further breach.] And the plaintiff in fact further saith, that the defendant during the continuance of the said tenancy, to wit, on —, ploughed up and converted into tillage a certain piece or parcel of land then in grass, called —,

and parcel of the said farm and lands, and cropped and sowed the same, without manuring or dressing the same with manure; contrary to the course of good husbandry and the custom of the country aforesaid, and to the said promise and undertaking of the defendant.

Further breach.] And the plaintiff in fact further saith, that the defendant during the continuance of the said tenancy, to wit, in the successive years of our Lord, — and —, wrongfully and injuriously cropped, planted and sowed a certain other piece or parcel of land, called —, part and parcel of the said farm, with divers, to wit, four successive crops of corn, potatoes and turnips, to wit, wheat, potatoes, turnips and wheat; and also without manuring or dressing the said last-mentioned land with manure; contrary to the course of good husbandry and the custom of the country where the said farm, lands and premises were so situate as aforesaid. By means of which said several premises, the said farm became and was greatly impoverished and rendered less productive than the same otherwise would have been, and greatly deteriorated in value. And the plaintiff claims £ —

In one case, where the promise stated was, to farm the lands in a husbandlike manner, the court seemed of opinion that it would be sufficient to assign the breach in the words of the promise (*e*); but the court recommended an amendment, by stating the particular facts complained of (*f*); and no doubt that is the technical and proper way of stating the breach.

Evidence.

Under a general plea of denial, the plaintiff must prove,—

1. The tenancy. And care should be taken that there be no variance, in this respect, between the tenancy proved and that stated. Where the declaration stated the defendant to be tenant to three persons, and the evidence was that he was tenant to two only, it was holden to be a fatal variance (*g*). Where the tenancy was stated to be of land in F., and it was

(*e*) *Earl of Falmouth v. Thomas*,
1 Cr. & M. 89.

(*f*) *Id.*

(*g*) *Saunderson v. Griffiths*, 5 B.
& C. 909.

proved to be of land in F. and C., the variance was holden fatal (*h*).

2. The course of good husbandry, and the custom of the country, in that part of the country in which the lands are situate, with respect to the matter or matters of complaint stated in the declaration. This can be proved by farmers, or persons of experience in agriculture, in the neighbourhood of the lands demised. By the custom of the country, is merely meant the prevailing usage among farmers in that part of the country; the plaintiff is not obliged to prove one uniform and undeviating custom upon the subject. And therefore where the breach was that the defendant treated the land contrary to good husbandry and the custom of the country; and the proof was, that he treated the land contrary to the prevalent custom in the neighbourhood, by tilling half his farm at once, when no other farmer tilled more than a third, and many only a fourth: this was holden to be sufficient (*i*).

3. The damage.

As to using the Premises in a tenant-like manner.

From the fact of the tenancy, the law will imply a contract on the part of the tenant, to use the premises in a proper and tenant-like manner, if there be no express stipulation upon the subject.

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F. his attorney [or in person] sues C. D., the defendant in this suit: For that, on — the defendant had become and was tenant to the plaintiff of a certain messuage, garden and premises; and in consideration thereof, he the defendant undertook and promised the plaintiff to use the said messuage, garden and premises, with the appurtenances, in a tenant-like and proper manner for and during the

continuance of the said tenancy. Yet the defendant, during the continuance of the said tenancy, used the said last-mentioned messuage, garden and premises, and the trees therein, in so untenant-like and improper a manner, that by reason thereof, the said messuage, garden and premises then became and were and still are ruinous, and greatly dilapidated, and the trees of the said plaintiff, growing in and upon the said premises, became and were and still are greatly damaged and spoiled. And the plaintiff claims £ —.

Evidence.

Under the general issue, the plaintiff must prove,—

1. The tenancy (*k*).
2. The state of the premises, at the time the defendant first took possession of them.

(*h*) *Pool v. Court*, 4 Taunt. 700.
(*i*) *Legh v. Herrett*, 4 East, 154.

(*k*) *Vide supra*.

3. The state in which the defendant left them, or in which they were at the time of the commencement of the action.

4. The damage.

It is no defence to this action that the landlord has evicted the tenant from part of the demised premises, and that the latter has relinquished possession of the residue (*b*).

As to Repairs.

If a man lease a house to another for life or years, or from year to year, the lessor is not bound to repair it, without an agreement for that purpose (*c*); but the lessee, who has the use of it, ought to do so: and from his duty to repair it, the law implies a promise by him to that effect. That duty did not exist at common law (*d*); but by the statute of Gloucester (*e*), the lessor may have an action of waste, or upon the case in the nature of waste, against the lessee, if the latter permit the house to be out of repair, unless it were ruinous at the time of the lease (*f*); for that statute extends to permissive, as well as voluntary, waste (*g*).

Declaration.

Same as the last form, to the words:] For that the defendant heretofore, to wit, on —, had become and was tenant to the plaintiff of a certain messuage, garden and premises; and in consideration thereof, he the defendant undertook and promised the plaintiff, that he the defendant would, during the continuance of the said tenancy, keep the same messuage, garden and premises in tenantable repair, order and condi-

tion: Yet the defendant, during the continuance of the said tenancy, did not keep the said messuage, garden and premises in tenantable repair, order and condition, but suffered and permitted the same to be and continue in so untenant-like and improper a manner that by reason thereof the said last-mentioned messuage, garden and premises became and were and still are ruinous and greatly dilapidated. And the plaintiff claims £—.

Evidence.

The evidence may be the same as in the last case. That the landlord parted with his reversion to another before breach, is it seems no defence to the action (*h*).

In other Cases.

In what cases an ejectment, as for a forfeiture, will lie against

(*b*) *Morrison v. Chadwick*, 18 Law J. 189, cp.

(*c*) *Arden v. Pullen*, 10 Mees. & W. 321.

(*d*) 5 C. 13 b.

(*e*) 6 Ed. 1, c. 5.

(*f*) Co. Lit. 54. b.

(*g*) Co. Lit. 53. a; 2 Inst. 145. See *post*, tit. "Waste."

(*h*) See *Bickford v. Parson et al.*, 17 Law J. 192, cp.

a tenant, for a breach of an implied agreement, or an agreement not under seal, see the cases cited below (i).

CHAPTER III.

The Landlord's Remedies for Waste.

At common law, the writ of waste lay against tenant in dower, tenant by the curtesy (*k*), and guardian in chivalry or socage (*l*); but not against lessee for life or years (*m*).

By stat. Marlebridge (52 H. 3), c. 23, s. 2, fermors, during their terms, shall not make waste of houses, woods, or any thing belonging to the tenements which they have to ferm, without special licence had by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amercement grievously. The word "fermors" here, is holden to mean all persons who hold lands for life or years, by deed or without it (*n*). And although the statute says that they shall not "make" waste, yet it has been holden to extend to permissive, as well as to voluntary, waste (*o*).

And by stat. Gloucester (6 Ed. 1), c. 5, "it is provided also, that a man from henceforth shall have a writ of waste in the Chancery, against him that holdeth by the law of England, or otherwise for term of life, or for term of years, or a woman that holdeth in dower; and he which shall be attainted of waste, shall leese (lose) the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at." This statute, also, extends to permissive, as well as voluntary, waste (*p*).

(i) See *Doe v. Amey*, 12 Ad. & El. 476; *Doe v. Kneller*, 4 Car. & P. 3, ante, pp. 110, 194, 195.

(*k*) 2 Inst. 145, 300.

(*l*) Inst. 185, 305; F. N. B. 50 F. See Co. Lit. 54. a.

(*m*) 2 Inst. 299, 145; 5 Co. 13 b; Com. Dig. Waste, A. 2.

(*n*) 2 Inst. 145.

(*o*) *Hammond v. Webb*, 10 Mod. 281.

(*p*) Lit. s. 71. Co. Lit. 57. a. *Countess of Shrewsbury's case*, 5 Co. 13 b. Cro. El. 777, 784. *Panton v. Isham*, 3 Lev. 359.

SECTION I. *Remedy for Waste, by Action.*II. *Remedy by Bill in equity for an Injunction.*

SECTION I.

*Remedy for Waste, by Action.**In what cases.*

Waste is a spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to the dishersion of him that hath the remainder or reversion in fee simple or fee tail (*q*). Waste is either voluntary, which is a crime of commission, as by pulling down a house; or it is permissive, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste (*r*). Whatever alters the nature of the property, so as to render the evidence of ownership more difficult, or to destroy or weaken the proof of identity, is in strictness waste. The remedy is either by writ of waste, to recover the land wasted, and also treble damages (*s*); or by action on the case, to recover single damages. And this, whether the defendant be under a covenant to repair or not (*t*). But if the defendant be bound by covenant to deliver up the premises, at the end of the term, in the same good condition into which they were put by J. M., his merely not having done so is not the subject of an action on the case in the nature of waste (*u*). The writ of waste, however, is very seldom resorted to in practice, at present: modern leases have usually a clause in them, giving the lessor a power of entry in case the lessee commit waste or destruction, and the lessor may thereupon recover the premises in an ejectment; and the effect in the writ of waste, with respect to damages, is now obtained by the action on the case above mentioned. But although the writ of waste is now nearly obsolete, yet as the action on the case lies in all cases where a writ of waste lies, provided the waste be such as to be injurious to the reversion (*v*), and as ejectment upon a forfeiture for waste lies also in the same cases (*w*), it will be as well to treat of the acts and omissions for which a

(*q*) Co. Lit. 53.(*r*) 4 Co. 64.(*s*) St. Gloucest. (6 Ed. 1.) c. 5, ante, p. 199, and see Com. Dig. Waste, F. 2, Pleader, O. 22.(*t*) *Kenlyside v. Thornton* 2 W. Bl., 1111; but see *Herne v. Bembow*, 4 Taunt. 764, *semb. cont.*(*u*) *Jones v. Hill*, 7 Taunt, 392.(*v*) *Baxter v. Taylor*, 1 Nev. & M. 13; *Young v. Spencer et al.*, 10 B. & C. 145.(*w*) *Doe v. Bond*, 5 B. & C. 855.

writ of waste will lie, in the first place, and then add the decisions which distinguish in some degree the action on the case from the writ of waste.

For waste in houses.] If a lessee, &c., pull down the houses demised, it is waste (*x*). So, if he pull down a house demised, and rebuild it smaller than it was before (*y*), or rebuild it larger, to the prejudice of the lessor, who may thereby be at greater charge in repairing it (*z*); or if he alter the house to the lessor's prejudice: as if he convert a parlour into a stable (*a*), or a corn mill to a fulling mill (*b*), or horse mill, even although it be for the lessor's advantage (*c*); or if he turn two rooms into one (*d*); or convert a brewhouse of 120*l. per ann.*, into tenements of 200*l. per ann.* (*e*); or even if he build a new house, where there was none before (*f*), or, having built it, suffer it to be decayed (*g*): in all these cases he is guilty of waste. So, if he pull down or remove any part of the house demised, as the windows, doors, wainscot, benches, furnaces or other fixtures (*h*), although fixed by the lessee himself with nails, screws or otherwise (*i*), it is waste. But he may remove furnaces, coppers or other utensils of trade, [or marble chimney pieces,] though fixed to the freehold, during his term (*k*); but, it seems, if they remain till the end of the term, he shall not remove them, but they shall go to the reversioner (*l*).

So, if the lessee, &c., suffer the house to be uncovered, whereby the timber decays (*m*), although the timber be not thereby thrown down (*n*); or if he suffer *statiuncula ante ostium* to be uncovered, whereby the timber thereof becomes rotten (*o*); or suffer glass windows to be broken or carried away (*p*); or if he permit the walls of a house to be decayed for want of plaistering, whereby the timber is rotted (*q*); or the chambers of a house (*r*), though the timber be not

(*x*) Co. Lit. 53. a.

(*y*) 2 Rol. 815, l. 33.

(*z*) Id. l. 35.

(*a*) Per Vavasor, Kellw. 38; 2 Rol. 815, l. 31.

(*b*) Per 2 J. Id. 814, l. 46 D.; 2 Cro. 182.

(*c*) 2 Cro. 182.

(*d*) R. Kellw. 39; 2 Rol. 815, l. 37.

(*e*) R. 1 Lev. 309, 311; 1 Mod. 94; 2 Saund. 252.

(*f*) Co. Lit. 53. a; Per 2 J. 2 Rol. 815, l. 45; Ent. per Wood, Kellw. 38; D. cont. Hob. 234.

(*g*) Adm. 42 E. 3, 21 b.; Co. Lit. 53. a.

(*h*) Co. Lit. 53. a. 4 Co. 63 b; and see 3 East, 38.

(*i*) R. 4 Co. 64 a; R. Moor, 177; Cont. per Dod. 1 Rol. 216.

(*k*) 1 Salk. 368; Semb. 21 H. 7, 27 a; R. 20 H. 7, 13 b.

(*l*) 1 Salk. 368; 21 H. 7, 27 a; 20 H. 7, 13 b; Com. Dig. Waste, D. 2; and see Bac. Abr. Waste, C. 5, 6; Bro. Waste; 3 Atk. 13, 10, n.; 1 H. Bl. 258.

(*m*) Co. Lit. 53. a.

(*n*) 2 Rol. 815, l. 31. See *Vane v. Lord Barnard*. 1 T. R. 54, cit.

(*o*) 2 Rol. 814, l. 25.

(*p*) Co. Lit. 53. a; R. 4 Co. 63 b.

(*q*) R. 2 Rol. 816, l. 30.

(*r*) Id. l. 45.

thereby rotted (*s*); or if he do not scour a mote, &c., whereby the groundsel, &c., is decayed (*t*); and formerly if he suffered the house to be burnt by neglect or mischance, it was waste (*u*); but by 6 Ann. c. 31, s. 6, no action for waste shall be brought against any person in whose house a fire shall accidentally begin; which, however, by sect. 7, is not to affect any agreement between landlord and tenant. Also, if the house be uncovered by tempest, and it be suffered afterwards to remain in decay (*v*): in all these cases the tenant will be guilty of waste. And it will be waste, although there be no timber on the land demised for repairs (*w*). So, it will be waste if the walls be suffered to decay, though the timber was decayed at the commencement of the lease (*x*). So, if the house were uncovered at the commencement of the lease, yet it will be waste if the tenant pull it down (*y*); or, if it were ruinous at the commencement of the lease, and he suffer it to be more so (*z*). But if the house or walls were uncovered at the commencement of the lease, it is no waste if the lessee suffer them to decay, without pulling them down (*a*). Or if the house were ruinous, and the lessee do not suffer it to be more so, but merely permits it to be as it was, it is not waste (*b*).

For waste in lands.] If the lessee, &c., suffer the sea to surround arable land, meadow or pasture, it is waste (*c*), if it happen by his default (*d*); but otherwise if it be occasioned by the violence of a tempest. So, if he suffer a wall or bank against the sea or river, &c., to be ruinous, whereby the water surrounds a meadow, &c., and renders it useless, it is waste (*e*). So, if he dig up the surface of the land, and carry it away, it is waste (*f*). So, if he convert wood to arable land, or arable to wood (*g*); or meadow to arable (*h*), or pasture (*i*), or meadow to orchard or hop-garden, although it be thereby meliorated (*k*); or convert a hop-garden to tillage (*l*): in all these cases the tenant is guilty of waste. But if pasture be converted to tillage, for the improvement of the soil (*m*), or if the land were sometimes pasture and sometimes arable (*n*), or

(*s*) Semb. 2 Rol. 817, l. 1.

(*t*) R. Ow. 43.

(*u*) Co. Lit. 53. b; 2 Rol. 820, l. 42.

(*v*) Co. Lit. 53. a; Per 2 J. Moor, 62; 2 Rol. 818, l. 2.

(*w*) Co. Lit. 53. a.

(*x*) 2 Rol. 817, l. 53.

(*y*) Co. Lit. 53. a.

(*z*) 2 Rol. 818, l. 2.

(*a*) Co. Lit. 53. a; R. Owen, 93.

(*b*) Com. Dig. Waste, D. 2.

(*c*) 2 Rol. 816, l. 40.

(*d*) Moor, 62, 73.

(*e*) Co. Lit. 53. b; Moor, 69.

(*f*) R. 2 Rol. 816, l. 15.

(*g*) Co. Lit. 53. b.

(*h*) Co. Lit. 53. b; Moor, 101; 2 Rol. 815, l. 4, 814, l. 50. *Simmons v. Norton*, 7 Bing. 640.

(*i*) 2 Rol. 814, l. 50; 1 Ch. Rep. 106, 116.

(*k*) 2 Leon. 174.

(*l*) Owen, 67.

(*m*) 2 Rol. 814, l. 47.

(*n*) Id.

if it were stocked with coney, it not being a warren by charter or prescription (*o*); it is no waste. So, if the land lie fallow, whereby it becomes overrun with bushes, &c., this is not waste, although it be bad husbandry (*p*). So, if trenches are dug in a meadow, to draw off the water, it is not waste (*q*). But if lessee for life or years open new mines in the land, where there is no mention of mines in the lease, it is waste (*r*). So, if he dig for gravel, lime, clay, brickearth, stone, &c., in pits not already open, it is waste (*s*). But it is not waste to dig for metal, coal, &c., in mines open at the time of the lease (*t*), or if the land were demised with all mines (*u*); nor is it waste for a parson, vicar, &c., to dig or open mines in his glebe (*v*).

For waste in woods, &c.] If a lessee, &c., cut down trees, which by law or the usage of the country are esteemed timber, it will be waste (*w*). Oak, ash and elm are timber after the age of twenty years, throughout the realm (*x*); and beech, willow, hornbeam, &c., where they are scarce, may be accounted timber, by the custom of the country (*y*). So, if it be found by verdict that the tenant cut down blackthorn, *existent' arbores maheremiales*, it is waste (*z*); or if he cut down whitethorn, where it is in a large quantity, or made wood by the custom of the country, it is waste (*a*); or if he destroy the germins of oaks, &c., it is waste (*b*). So, if a lessee do an act by which the timber trees decay, as if he lop and top them, it is waste (*c*). But it is not waste to cut down trees which are not timber, unless they are growing for shelter of the house (*d*). So, it is not waste to cut down timber trees that are dead, *nec fructum nec folia portan'* (*e*). So, cutting the underwood of oak, ash, willow, &c., is no waste (*f*), though it be twenty years since the last fall (*g*); but if the tenant extirpate or destroy the germins of such underwood, it will be waste (*h*). So, if he cut down bushes, whitethorn, &c., it is not waste (*i*); but otherwise if he root up or destroy a quickset of whitethorns,

(*o*) R. 2 Rol. 815, l. 15; 816, l. 15; and see Owen, 66.

(*p*) 2 Rol. 814, l. 35. *Hutton v. Warren*, 1 Mees. & W. 472.

(*q*) R. 2 Rol. 820, l. 23; 2 Leon. 174.

(*r*) Co. Lit. 53. b; R. 5 Co. 12; R. 2 Mod. 193.

(*s*) Co. Lit. 53. b; Moor, 101.

(*t*) Co. Lit. 53. b; R. 5 Co. 12. *Viner v. Vaughan*, 2 Beav. 446.

(*u*) R. 5 Co. 12.

(*v*) Semb. 1 Sid. 132; Com. Dig. Waste, D. 4; and see Bac. Abr. Waste, C. 1, 3.

(*w*) Co. Lit. 53. a.

(*x*) Co. L. 53. a; Dy. 65 b. See 8 T. R. 145.

(*y*) Co. Lit. 53. a; R. Moor, 812.

(*z*) R. 2 Rol. 819, l. 52; Cro. Car. 531.

(*a*) 2 Rol. 817, l. 12; 2 Cro. 126.

(*b*) Co. Lit. 53. a.

(*c*) Dy. 65 a; Co. Lit. 53. a.

(*d*) Co. Lit. 53. a; and see Hob. 219.

(*e*) Co. Lit. 53. a; 2 Rol. 814, l. 17.

(*f*) Per 2 J. 2 Rol. 817, l. 17, 20.

(*g*) Semb. 1 Sid. 300.

(*h*) Co. Lit. 53. a.

(*i*) R. 2 Cro. 126.

&c. (*h*). So, cutting down timber for necessary botes,—as for fuel, ploughbote, hedgebote, &c., is no waste (*i*); but if a lessee cut down trees for fuel when there is *lignum aridum* sufficient, it is waste (*h*). So, cutting down timber to repair the house, &c., or the pales, gates, fences, &c., is not waste (*l*): and this, although the lessee have covenanted to repair at his own charges (*m*); or although the lessor have covenanted to repair (*n*); or although the lessee would not be otherwise liable for waste if he had not repaired (*o*). But if he cut down timber for new pales, fences, &c., where there were none before (*p*), or for building a new house (*q*); or if he sell the trees, and repair with the money (*r*), or afterwards re-purchase the trees, and use them for repairs (*s*); or if he cut down the timber before he has occasion for it (*t*), or for repairs which are not necessary (*u*), or for repairs which were rendered necessary by the lessee's own default (*v*); or if he cut down timber for the use of mines, even although the mines be included in the lease (*w*), or although the mines were open at the commencement of the lease, and the lessor, &c., had been in the habit of using the timber for the mines (*x*): in all these cases the tenant will be guilty of waste. It will not be waste, however, if the trees be cut down for the repair of things useful, though not absolutely necessary,—as for water-troughs to be fixed in the ground for his cattle (*y*). It is necessary also to mention, that if the trees be excepted out of the demise, the tenant, if he take them wrongfully, is not punishable as for waste (*z*).

For waste in gardens, &c.] So, waste may be committed in a garden or orchard (*a*). As if the lessee cut down pear trees, apple trees, or other fruit trees (*b*). Or if they be thrown down by tempest, and the lessee afterwards root them up, or cut down the germins growing without planting new ones (*c*). So, it is waste for an outgoing tenant of garden ground to plough up strawberry beds in full bearing, although, when he entered, he paid for them on a valuation to the person who

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| (<i>h</i>) Co. Lit. 53. a; 2 Cro. 126. | (<i>t</i>) R. Cro. El. 593. |
| (<i>i</i>) Co. Lit. 53. b. | (<i>u</i>) 2 Rol. 822, l. 40. |
| (<i>k</i>) Co. Lit. 53. b; 2 Rol. 820, l. | (<i>v</i>) Co. Lit. 53. b; 2 Rol. 822, l. |
| 10. | 38. |
| (<i>l</i>) Co. Lit. 53. b. | (<i>w</i>) R. 2 Rol. 823, l. 30; Hut. 19; |
| (<i>m</i>) R. Moor, 23. | Hob. 234. |
| (<i>n</i>) Co. Lit. 54. b. | (<i>x</i>) Per Hob. 235. |
| (<i>o</i>) Co. Lit. 54. b; 2 Rol. 822, l. | (<i>y</i>) 2 Rol. 823, l. 22; Com. Dig. |
| 45, 10. | Waste, D. 5. |
| (<i>p</i>) Co. Lit. 53. b. | (<i>z</i>) 8 East, 19. See Bac. Abr. |
| (<i>q</i>) 2 Rol. 822, l. 35. | Waste, C. 2. |
| (<i>r</i>) Co. Lit. 53. b. | (<i>a</i>) 2 Rol. 817, l. 33. |
| (<i>s</i>) Co. Lit. 53. b; 2 Rol. 823, l. | (<i>b</i>) Co. Lit. 53. 2 Rol. 817, l. 30. |
| 15. | (<i>c</i>) 2 Rol. 817, l. 35. |

occupied the premises before him, and although it may have been usual for strawberry beds to be appraised and paid for as between outgoing and incoming tenants (*d*). So, if the lessee destroy the stock of a dovecot, warren, park, fishpond, pool, &c., or suffer it to be diminished (*e*); or throw down the pales of a park or warren (*f*); or stop up the holes of a dovecot (*g*); or throw down the banks, &c., of a fishpond, lake, &c., it is waste (*h*). If, however, he merely destroy some doves, &c., yet if he leave a sufficient stock remaining, it is no waste (*i*).

How, in case in the nature of waste.] Case in the nature of waste will lie for the same acts or omissions as the writ of waste; with this single exception, that case will lie only for such acts and omissions as are injurious to the reversion. Where, in an action of this kind, the declaration charged that the defendant (the tenant), without the leave or licence of the plaintiff (the landlord), opened a door in the wall of the house demised, whereby the house was greatly damaged, weakened and injured, and the plaintiff greatly prejudiced in his reversionary estate and interest of and in the premises; and the jury found that the defendant did open the door without leave, but that the house was not in any manner weakened or injured by it; and the judge therefore ordered a verdict to be entered for the plaintiff, subject to the opinion of the court; and an application was accordingly made to enter the verdict for the defendant: but as it was not found whether the plaintiff had sustained any injury in his reversionary interest or not,—for the reversion might be injured, although the house itself was not,—the court ordered a new trial (*k*).

By and against whom.

By whom.] This action must be brought by him who has the immediate remainder or reversion, in fee or in tail (*l*); and whether he claim by purchase or descent, is immaterial (*m*). Therefore, if there be a lease for life or years, remainder to another for life, reversion to another in fee or in tail, and the lessee commit waste: the reversioner cannot have a writ of waste during the continuance of the remainderman's

(*d*) *Wetherell v. Howells*, 1 Camp. 227.

(*e*) Co. Lit. 53. a; R. 4 Leon. 240; 2 Inst. 304; R. 2 Leon. 222.

(*f*) Owen, 60.

(*g*) Id.

(*h*) Id. 67.

(*i*) 2 Leon. 222; Com. Dig. Waste,

D. 3. And see Bac. Abr. Waste, C. 4.

(*k*) *Young v. Spencer et al.*, 10 B. & C. 145. See also *Doe v. Bond*, 5 B. & C. 855, *ante*, p. 106.

(*l*) Co. Lit. 53. a.

(*m*) 2 Rol. 825, l. 44.

estate (*n*); but if the remainderman die, or surrender his estate, the reversioner may then bring his action against the lessee (*o*). If the remainder, however, had only been for years, the reversioner might bring his action immediately, without waiting for the determination of the remainderman's estate (*p*). Waste does not lie by tenant in tail after possibility of issue extinct (*q*), even although the waste were committed before the death of the party whose issue was to have inherited (*r*). Also, the party who brings the action must have been seised of an estate of inheritance at the time of the waste committed. And therefore an heir cannot have a writ of waste for waste committed in the lifetime of his ancestor (*s*); nor a bishop, parson, &c., for waste committed in the time of his predecessor (*t*); nor the grantee of a reversion for waste committed before his grant. Yet a surviving joint tenant may have a writ of waste, for waste committed in the lifetime of his companion, or a surviving parcener for waste in her sister's time (*u*).

But the action on the case in the nature of waste has this advantage over the old writ of waste, that it may be bought by him in reversion or remainder for life or years, as well as in fee or in tail (*v*). But where A. and his wife were seised of a messuage for their joint lives and the life of the survivor, and all the estate and interest of A. became vested in J. S., who afterwards permitted waste, in the lifetime of A.: it was holden that the wife, who survived her husband, could not maintain an action on the case against J. S. for the waste (*w*).

Against whom.] At common law, waste lay against tenant in dower, tenant by the courtesy (*x*), guardians in chivalry or socage (*y*): but not against lessee for life or years (*z*). By stat. Gloucester, c. 5 (*a*), however, lessees for life or years are punishable for waste (*b*); and this extends to their assignees (*c*), and to a devisee for life or years (*d*); and to tenant from year to year (*e*). So, if a tenant hold over after the determination of his tenancy by notice to quit or otherwise, and be guilty of waste during the time he is in pos-

(*n*) Co. Lit. 54. a; Alleyn, 81; 2 Ro. Ab. 829; Cro. Jac. 688.

(*o*) Moor, 387; 5 Co. 76 b; W. Jon. 51.

(*p*) Co. Lit. 54. a; 2 Inst. 301.

(*q*) 2 Rol. 825, l. 31.

(*r*) Moor, 18.

(*s*) 2 Inst. 305.

(*t*) 2 Rol. 824, l. 43, 49. R. 1 Rol. 432

(*u*) 2 Inst. 305. See Com. Dig. Waste, C. 2; 3 Bac. Abr. Waste, G.;

2 Saund. 252 a. (n. 7.)

(*v*) 2 Saund. 252, b.

(*w*) *Bacon v. Smith et al.*, 1 Q.B. 345.

(*x*) 2 Inst. 145, 300.

(*y*) 2 Inst. 135, 305. F. N. B. 59,

F. See Co. Lit. 54. a.

(*z*) 2 Inst. 299, 145. 5 Co. 13 b.

See Com. Dig. Waste, A. 2.

(*a*) *Ante*, p. 199.

(*b*) See 2 Inst. 301.

(*c*) *Saunders v. Norwood*, Cro. El. 683.

(*d*) 2 Rol. 826, l. 25.

(*e*) 2 Inst. 302. Co. Lit. 54. b.

session, an action on the case in the nature of waste may be maintained against him (*f*). But a tenant at will, in the strict sense of the term, is not punishable for permissive waste (*g*). Formerly, an action could not be brought against an executor for waste committed by his testator, it being a tort which died with the person (*h*). But now, by stat. 3 & 4 W. 4, c. 42, s. 2, an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and the action be commenced within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of the deceased.

Declaration for Voluntary Waste, in a Dwelling-house.

In the Queen's Bench.

The — day of —, A. D. 18—. Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the defendant, at the time of the committing of the grievances hereinafter mentioned, to wit, on —, being tenant to the plaintiff of a certain messuage and dwelling-house, at a certain rent,* wrongfully and unjustly, without the leave or licence and against the will of the

plaintiff, [pulled down ten window frames, twenty window sashes, and two hundred panes of glass fixed therein, of and belonging to the said messuage and dwelling-house, and then affixed thereto, and of and belonging to the plaintiff, as landlord of the said messuage and dwelling-house, and as parcel thereof, and being of the value of £20, and then carried away the same, and converted and disposed thereof to his own use]. And the plaintiff claims £—.

The nature of the waste must be stated; otherwise the declaration would be bad for uncertainty. But it is not necessary to set out the title of either the plaintiff or the defendant, as in the count on the old writ of waste (*i*).

Declaration for Voluntary Waste, in Woods, &c.

As in the last form to the asterisk*] wrongfully and unjustly, without the leave or licence and

against the will of the plaintiff, [rooted up, felled and destroyed divers timber trees and a large quan-

(*f*) *Burchell v. Hornsby*, 1 Camp. 360.

(*g*) Lit. s. 71. Co. Lit. 57. a. 5 Co. 13 b. Cro. El. 777, 784. 3 Lev. 359. *Gibson v. Wells*, 1 New Rep. 290; and see *Harnett et ux. v. Maitland*, 16 Law J. 134, ex.

(*h*) 2 Inst. 302. 2 Ro. Abr. 828 1. 34. See Com. Dig. Wast. C. 4, 5. Bac. Abr. Waste, H. F. 1 Saund. 323, b. (n. 7.) 2 Saund. 252 a. (n. 7.)

(*i*) 2 Saund. 252, c. d.

tity of bushes, to wit, five hundred oak trees, five hundred ash trees, five hundred elm trees, and five hundred other trees, and fifty cart loads of bushes, of the plaintiff, of great value, to wit, of the value of £—, then growing and being in and upon the said premises, and wrongfully and unjustly carried away the same, and converted and disposed thereof to his own use; and also then wrongfully and unjustly, without the leave or licence and against

the will of the plaintiff, lopped, topped, and shrouded divers maiden trees, to wit, forty oak trees, forty elm trees, and forty other trees of the plaintiff, of great value, to wit, of the value of £—, then also growing and being in and upon the said premises, and took and carried away the wood thereof coming, and converted and disposed thereof to his own use]. And the plaintiff claims £—.

Declaration for Voluntary Waste, as to Hedges, &c.

*As in the last form but one to the asterisk**] wrongfully and unjustly, without the leave or licence and against the will of the plaintiff, [broke down, spoiled and destroyed divers hedges and fences, to wit, one hundred perches of hedges, and one hundred perches of fences, of the plaintiff, of and belonging to the said premises, and the bushes,

thorns and wood thereof coming, to wit, twenty cart loads of bushes, twenty cart loads of thorns, and twenty cart loads of wood, of the said plaintiff, of the value of £20, and took and carried away the same, and converted and disposed thereof to his own use]. And the plaintiff claims £—.

Declaration for Permissive Waste.

As in the form ante, p. 207, *to the asterisk**] heretofore, to wit, on —, and on divers other days and times between that day and the day of commencing this action, wrongfully and injuriously permitted and suffered the said [messuage and dwelling-house, stables,

barns and outhouses] to be prostrate, ruinous, fallen down, and in great decay, in the timber, doors, wainscots, windows, window shutters, floors, tiling, joists, beams and rafters thereof, for want of needful and necessary repairing thereof. And the plaintiff claims £—.

General Issue.

In the Queen's Bench.

The — day of —, A. D. 18—.

J. N. } The said defendant, by G. H., his attorney, [or in person,]
 ats. }
 J. S. } says that he is not guilty.

Evidence.

Under the general issue, the plaintiff will merely have to prove the waste stated, and the amount of damage; if the defendant would put him to the proof of the tenancy, and of the plaintiff's reversionary interest, he must traverse that part

of the inducement in the declaration (*n*). And the proof must be of the same species of waste as is laid. Therefore, under a count for voluntary waste, he cannot give any instance of permissive waste in evidence; even where the declaration charged that the defendant wrongfully cut down divers, to wit, twenty trees, and used the premises in so untenant-like and improper manner, that they became and were greatly dilapidated: the court held that this was an allegation of voluntary waste, and that the plaintiff could not be allowed to give permissive waste in evidence, in proof of it (*o*).

The defendant, under this plea, can only disprove or contest that which the plaintiff is bound to prove. As has been already mentioned (*p*), if he be desirous to contest any fact in the inducement of the declaration, namely, the tenancy, or the plaintiff's title to the reversion, in cases where he is allowed to do so (*q*), he must traverse it. So, if he would set up any matter of defence, which confesses the acts of waste, but justifies them, as being allowed of by the custom of the country, or the like, he must plead it specially (*r*).

SECTION II.

Remedy for Waste, by Bill in Equity for Injunction.

The remedy for waste by action, is in many cases very inefficient: for the cutting down of ornamental timber, for the ploughing up of old meadows and pastures, for the making of alterations in houses or buildings against the expressed will of the landlord, the damages given by a jury would be a very inadequate compensation for the real injury sustained; and even if adequate, it might happen that the tenant might not be able to pay them. Courts of equity therefore interfere, and upon a bill filed, stating the facts, will in general grant an injunction, to restrain the tenant from completing the act of waste, if he have begun it, or from taking any steps to effect it, if he have merely threatened it. But the court must be satisfied that the act of waste will be committed, if it do not interfere: and for this purpose, it is necessary to show, either that the party has actually commenced the act of waste intended, or that he has threatened to effect it (*s*); no mere conjecture or belief of the intention, will be sufficient. (*t*).

(*n*) See 1 Arch. Nisi Prius, 552. 640. See *Taylor v. Stendall*, 14
 (*o*) *Martin v. Gilham*, 7 Ad. & Law J. 301, qb.
 El. 540. (*s*) *Gibson v. Smith*, 2 Atk. 183.
 (*p*) *Supra*. (*t*) See *Hanson v. Gardiner*, 7
 (*q*) *Vide, post*. Ves. 310.
 (*r*) *Simmons v. Norton*, 7 Bing.

The court in this way will grant an injunction to restrain a lessee from cutting down growing timber (*u*); from injuring fish ponds (*v*); from converting pasture land into arable, where there is a covenant not to do so (*w*), and from ploughing up ancient meadow, whether there be a covenant upon the subject, or not (*x*); from sowing land with mustard seed, or any other pernicious crop, not easily eradicated (*y*); and the like (*z*).

And they have thus granted an injunction, against a lessee for years (*a*), an under-lessee (*b*), a tenant from year to year (*c*); and have granted it to a termor at a ground rent, against his lessee (*d*).

Where a bill is thus filed for an injunction to stay waste, and waste has been already committed, the court, to prevent multiplicity of suits, will not oblige the party to bring an action at law, but will decree an account and satisfaction for what is past, besides restraining the doing of any further injury (*e*); but after the determination of a tenant's estate by assignment or otherwise, a bill will not lie for an account of timber cut down (*f*), no injunction being prayed, or necessary, there being no injury to be prevented. If indeed a person commit waste, and continue in possession, there an injunction to stay waste is proper, from the probability of his again committing it (*g*); and in that case the bill may also pray for an account of the waste already committed.

In cases of waste, where irreparable injury may be done if the court do not interfere promptly, the injunction will be granted immediately (*h*).

(*u*) Redesdale, Pl. 111.

(*v*) *Ld. Bathurst v. Burdon*, 2 Bro. C. C. 64.

(*w*) *Drury v. Molins*, 6 Ves. 328; and see 3 Anstr. 750. *Goring v. Goring*, 3 Swanst. 661.

(*x*) *Ld. Grey de Wilton v. Saxon*, 6 Ves. 106.

(*y*) *Pratt v. Brett*, 2 Madd. R. 62.

(*z*) 1 Madd. 146.

(*a*) 1 Ro. Abr. 380. *Bp. of Lon-*

don v. Webb, 1 P. Wms. 527.

Pratt v. Brett, supra.

(*b*) *Farrant v. Lovell*, 3 Atk. 723, Amb. 105.

(*c*) *Onslow v. —*, 16 Ves. 173.

(*d*) *Farrant v. Lee*, supra. 1 Madd. 145.

(*e*) *Jesus College v. Bloom*, 3 Atk. 262, Amb. 54.

(*f*) 3 Atk. 264.

(*g*) 3 Atk. 381. Madd. 149.

(*h*) 2 Madd. 217.

CHAPTER IV.

The Landlord's Remedies against the Tenant, for Holding Over, after the Expiration of the Tenancy.

SECTION I. *Action for Double Value.*

II. *Action for Double Rent.*

III. *Ejectment, &c.*

IV. *Action of Trespass for Mesne Profits.*

SECTION I.

Action for Double Value.

In what cases.] By stat. 4 G. 2, c. 28, s. 1, it is enacted that "in case any tenant or tenants for any term of life, lives, or years,—or other person or persons, who are or shall come into possession of any lands, tenements or hereditaments, by, from or under, or by collusion with, such tenant or tenants,—shall wilfully hold over any lands, tenements or hereditaments, after the determination of such term or terms, and after demand made, and notice in writing given, for delivering the possession thereof, by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized :—then and in such case, such person or persons so holding over, shall, for and during the time he, she or they shall so hold over, or keep the person or persons entitled out of possession of the said lands, tenements and hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators or assigns, at the rate of double the yearly value of the lands, tenements and hereditaments so detained, for so long a time as the same are detained, to be recovered in any of His Majesty's courts of record, by action of debt, against the recovering of which said penalty there shall be no relief in equity."

And this action will lie, even after the landlord has recovered possession of the premises by ejectment; for there is no incongruity in bringing both actions;—by the ejectment he recovers the possession, by this action he recovers a compensation for the time he has been kept out of possession (i). But this must be understood of cases where there is no real *bond*

(i) *Soulsby v. Neving*, 9 East 310.

fide defence to the ejectment; for if that action has been resisted under a fair *bonâ fide* claim of right, the holding over for such a purpose, will not be deemed a wilful holding over, within the meaning of the statute (*g*).

By whom.] This action may be brought by the landlord or lessor of the tenant holding over, or by the person to whom the remainder or reversion belongs (*h*). So that not only may the landlord or lessor of the tenant proceed under this statute, but where a tenant for life makes a lease, and dies, and the lease is determined by his death, the remainderman may also give the demand or notice required, and bring this action in case the tenant holds over. If the landlord or lessor be dead, the action may be brought by his representative:—by his heir, if he were seised in fee; by his executors or administrator, if he were entitled for a term of years only. But it cannot be brought by the administratrix of such executor, until she have first taken out administration *de bonis non*, even although the tenant may have attorned to her (*i*). If the parties entitled to the action be tenants in common, each may bring a separate action for the double value of his moiety (*k*); and they cannot sue jointly where there has been no joint demise (*l*).

Against whom.] It may be brought against any tenant for term of life or years,—or against any person who has come into possession under him, or by collusion with him. The action therefore does not lie against a weekly tenant (*m*), or a quarterly tenant (*n*); but it clearly extends to a tenant from year to year, for in contemplation of law he is tenant for a term of years. Where lands had been let to two joint tenants, and after the expiration of the term one of them held over, it was holden by Coleridge, J., at nisi prius, that they were both liable to the action; this was much doubted by Alderson, B., afterwards, upon a motion for a new trial in the same case, but the point was not decided (*o*).

Demand of possession.] The statute requires a demand to be made, and a notice in writing to be given, for delivering possession of the premises (*p*). These mean the same thing, namely, a notice in writing, demanding that possession of

(*g*) *Wright v. Smith*, 5 Esp. 203.

(*h*) See 4 G. 2. c. 28, s. 1, *supra*.

(*i*) *Tingrey v. Brown*, 1 B. & P. 310.

(*k*) *Cutting v. Derby*, 2 W. Bl. 1077.

(*l*) *Wilkinson v. Hall*, 1 Bing. N. C. 713.

(*m*) *Lloyd v. Rosbee*, 2 Camp. 453.

(*n*) *Semb. Wilkinson v. Hall*, 3 Bing. N. C. 508.

(*o*) *Hirst v. Horn et al.*, 6 Mees. & W. 393.

(*p*) See 4 G. 2, c. 28, s. 1, *supra*.

the premises be delivered up to the landlord (*q*) ; and where the holding has been from year to year, the ordinary notice to quit, which is given for the purpose of determining the tenancy, serves at the same time as a good demand of possession under this statute (*r*). It had before been determined that such notice and demand might be given before the determination of the term, notwithstanding that the order in which the words stand in the statute may imply the contrary (*s*) ; and where there was a demise to a woman from year to year, and a notice to quit was given to her ; after which, and before it expired, she married : it was holden not to be necessary to make a demand of the possession upon the husband, in order to enable the landlord to maintain his action for double value under this statute (*t*). This demand may be made, either by the landlord or lessor himself, or by his agent thereunto lawfully authorized (*u*) ; and a joint authority by mortgagor and mortgagee of premises, to a person to be the receiver, agent and attorney of the mortgagor, to receive the rents until satisfaction of the mortgage, to bring actions in case of non-payment of rent, to give notice to quit, to bring ejectment in case of non-compliance, &c., as fully as the mortgagor might have done, —was holden to be a sufficient authority to him to demand possession under this statute (*v*). So, a receiver, appointed by the court of Chancery, is an agent within the meaning of the statute, and may make the demand (*w*). The following may be the form :—

Form of the Notice, demanding Possession.

To Mr. J. N., of —.

Take notice that I hereby demand and require of you, that you deliver up unto me the possession of the messuage, lands and premises, with the appurtenances, situate at —, on — next, on which day your term and interest therein will determine ; and in case you shall fail so to do, and shall hold over the same after such the

determination of your term as aforesaid, and after this demand made and notice given, I shall, require you to pay to me, my executors, administrators or assigns, at the rate of double the yearly value of the said messuage, lands and tenements, for so long a time as the same shall be detained from me. Dated this — day of —, 18—. J. S.

Let the duplicates of this notice be made out, and signed by

(*q*) *Wilkinson v. Colley*, 5 Burr. 2004, 2008.

(*r*) *Hirst v. Horn et al.*, 6 Mees. & W. 303.

(*s*) *Cutting v. Derby*, 2 W. Bl. 1075.

(*t*) *Lake v. Smith*, 1 New Rep.

174, and see *Wilkinson v. Colley*, 5 Burr. 2004.

(*u*) See the statute, *supra*.

(*v*) *Poole v. Warren*, 8 Ad. & El. 582.

(*w*) *Wilkinson v. Colley*, 5 Burr. 2004.

the landlord in the presence of a witness; and let the same witness serve one of the duplicates upon the tenant.

Declaration.

In the Queen's Bench.

The — day of —, A D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the defendant, being tenant to the plaintiff of a certain messuage, and lands and premises, as tenant, the plaintiff during the said tenancy, to wit, on —, gave a notice in writing to the defendant, and then demanded and required him the defendant to deliver up the possession of the said tenements to the plaintiff on the said —, on which day the term, estate and interest of the defendant in the said tenements with the appurtenances determined: Nevertheless the defendant did not nor would, on the determination of the said term as aforesaid, deliver the possession of the said tenements, with the appurtenances, to the plaintiff, according to the said notice so given and the demand so made, as aforesaid, but on the contrary thereof, he the defendant wil-

fully held over the said tenements with the appurtenances, after the determination of the said term, and after the said notice so given, and the said demand so made, as aforesaid, for a long space of time, to wit, for the space of —, then next following, contrary to the form of the statute in such case made and provided. And the plaintiff in fact saith, that the said tenements, with the appurtenances, during the said time of holding over the same, and keeping the plaintiff out of possession thereof, as aforesaid, were of great yearly value, to wit, of the yearly value of £—; whereby, and by force of the statute in such case made and provided an action hath accrued to the plaintiff to demand and have of and from the defendant a large sum of money, to wit, the sum of £ —, being at the rate of double the yearly value of the said tenements, with the appurtenances, for so long time as the same were so detained as aforesaid. And the plaintiff claims £ —.

Evidence for Plaintiff.

Under the general issue the landlord must prove,—

1. The tenancy, and the determination thereof; and if the plaintiff were assignee of the reversion, he should prove the assignment.

2. The notice and service, and the day of the service, by the person who witnessed and served the notice.

3. That the defendant afterwards held over the premises, and for what time. Although the defendant will be presumed to have holden over the premises wilfully, from the fact of his not having delivered them up, yet it will be as well, if it can be conveniently done, to give in evidence circumstances showing that this was wilfully done.

4. The annual value of the premises.

Evidence for the Defendant.

The defendant, under the general issue, may dispute every thing which the landlord is bound to prove. He may show that he held over the premises under a fair *bonâ fide* claim of right. As, for instance, where a remainderman insisted that a lease, granted to the defendant by a previous tenant for life under a power, was not granted in conformity with the power, and, treating it as a nullity, gave the tenant a notice demanding possession under this statute; he afterwards brought an ejectment, which was contested, but ultimately decided in favour of the plaintiff, and he obtained possession of the premises under a writ of *habere facias possessionem*; he then commenced an action against the defendant upon this statute, to recover double value of the premises for the time he held over: but it was holden that, as the defendant held over under a fair *bonâ fide* claim of right, he was not liable (a).

The defendant may also show that the subject-matter of the demise, was not "lands, tenements or hereditaments," within the meaning of the statute. And therefore where the defendant had rented a room in a factory, together with a supply of power from a steam engine by means of a revolving shaft in the room: in an action against him, upon this statute, for holding over, the court held that in estimating the double value, the value of this steam power could not be included, as it did not come within the meaning of the terms "lands, tenements or hereditaments," in the statute (b).

The defendant, it should seem, also, may give any other defence under the general issue, which in other actions he would be obliged to plead specially; these actions for penalties by a party grieved being deemed to be within stat. 21 Jac. 1, c. 4, s. 4 (c). He may show, therefore, that the plaintiff has accepted the single rent for the premises, and thereby waived his right to double value (d). But where the landlord declared for double value, with a count for use and occupation, and the defendant pleaded *nil debet* to the first count, and a tender of the single rent before action brought to the second count, and paid the money into court, and the plaintiff took the money out of court, but still proceeded with the action: the court held that this was not such an acceptance of the

(a) *Wright v. Smith*, 5 Esp. 203.

Swannell, 3 Id. 154, and see 1 Arch.

(b) *Robinson v. Learoyd*, 7 Mees.

N. P. 349.

& W. 48.

(d) *Doe v. Batten*, Cowp. 243.

(c) See *Jones v. Williams*, 4 Mees. & W. 375. *Earl Spencer v.*

9 East, 314, n.

single rent as amounted to a waiver of the landlord's right to double value (e).

So, the defendant may show that more than two years from the accruing of the cause of action, had elapsed, before the action was commenced;—that being the time limited for bringing actions for penalties by a party grieved, by stat. 3 & 4 W. 4, c. 42, s. 3.

SECTION II.

Action for Double Rent.

In what cases.] By stat. 11 G. 2, c. 19, s. 18, after reciting that great inconveniences have happened and may happen to landlords, whose tenants have power to determine their leases, by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession, when the landlord hath agreed with another tenant for the same,—it is enacted that “in case any tenant or tenants shall give notice of his, her or their intention to quit the premises by him, her or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained :—that then the said tenant or tenants, his, her or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she or they should otherwise have paid ;—to be levied, sued for and recovered, at the same times, and in the same manner, as the single rent or sum before the giving such notice could be levied, sued for or recovered ; and such double rent or sum shall continue to be paid, during all the time such tenant or tenants shall continue in possession as aforesaid.” And the landlord, therefore, in such a case, may either distrain for this double rent (f), or may bring an action for it upon this statute.

A tenant holding under a parol demise from year to year is within this statute (g).

A notice by parol will be sufficient, within the meaning of the Act (h) ; because it is not required by law that a notice to quit, given by a tenant, should be in writing. But the statute applies only to cases where the tenant has the power of determining his tenancy by a notice, and where he has actually given a valid notice sufficient to determine such tenancy. And therefore a notice given less than half a year before the

(e) *Ryal v. Rich*, 10 East, 48.

(f) See *Johnstone v. Huddleston*, 4 B. & C. 922.

(g) *Timmins v. Rawlinson*, 3 Burr. 1603.

(h) *Id.*

end of the year of the tenancy, has been holden not to give the landlord a right to double rent, where the holding was from year to year (i). So, a notice that the tenant will quit, as soon as he can possibly get another situation, is not sufficient to render him liable to double rent (k).

Declaration.

In the Queen's Bench.

The — day of —, A.D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the defendant heretofore, to wit, on —, being tenant to the plaintiff of a certain messuage and dwelling-house as tenant from year to year, at the annual rent of £—, gave the plaintiff a certain notice of his intention to quit and deliver up unto the plaintiff the possession of the said messuage and dwelling-house upon the said 25th December, A.D. 18—.

Yet the said defendant did not quit or deliver up possession of the said messuage and dwelling-house on the said 25th December last aforesaid, but continued to hold and occupy the same from thence [hitherto]: wherefore by virtue of the statute in such case made and provided the plaintiff is entitled to have of and from the defendant double the said rent for the said messuage and dwelling-house from the said 25th day of December, until —. And the plaintiff claims £—.

Evidence.

Under the general issue, the plaintiff will have to prove,—

1. The notice of the defendant, and that it was signed by him, or by his authority; also, that the defendant was in possession of the premises mentioned in the declaration, at the time the notice was delivered.

2. The rent at which the defendant previously held the premises.

3. The length of time the defendant held the premises, after the expiration of his notice.

Special Pleadings.

It must be observed that the double rent given by this statute, is not to be considered in the nature of a penalty, as the double value mentioned in the last section, but as a rent assigned by the statute, to be paid by the tenant to his landlord during the time that he holds over, and for which the landlord has the same remedies precisely as he had for the former rent, under the regular holding. The time limited for bringing the action, therefore, is six years; and the special pleadings are the same as in an action for use and occupation (l), or in *assumpsit* generally.

(i) *Johnstone v. Huddleston*, 4 B. & C. 922.

(k) *Farrance v. Elkington*, 2 Camp. 501.

(l) *Ante*, p. 167.

SECTION III.

Action of Ejectment against a Tenant Holding Over.

Where the demise, under which a tenant has holden, has expired, or has been determined by a notice to quit, the landlord thereupon immediately acquires a right of entry upon the premises; and he may peaceably enter upon them; and he may then maintain trespass against the tenant who still remains in possession (*l*); but he cannot forcibly turn the tenant or his family out of possession (*m*). If, however, there be no person in possession, the landlord may not only enter, but he may retain the possession against the tenant, in the same way as he may retain it against a stranger, and if the premises consist of a house, and the house be locked, the landlord it seems will be justified in breaking into it, for the purpose of obtaining possession (*n*), provided it be not done with that array of force which by law would constitute a forcible entry.

But in all other cases, if his tenant insist on holding over, and refuse to quit the premises, the only modes by which the landlord can obtain possession are either by ejectment, or by summary proceedings before justices of the peace under stat. 1 & 2 Vict. c. 74. These two modes of proceeding, we shall now consider in their order. And first, of Ejectment.

1. *The Tenancy, and how determined; and the Evidence in the Action.*

The proceedings in an action of ejectment against a tenant, for holding over after his term has expired or been determined, will be found *post*, p. 224: the writ and notice, p. 224; the bail or judgment, p. 225; the mesne profits, p. 226; judgment stayed, p. 226. We shall first, however, consider the mode in which the tenancy may be determined, and the evidence for the plaintiff in each particular case, under the following heads:—

Tenancy at will.] A tenancy at will, is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession (*o*). And in law it is holden at the will

(*l*) *Butcher v. Butcher*, 7 B. & C. 399.

(*m*) *Newton et ux. v. Harland et al.*, 1 Man. & Gr. 644.

(*n*) *Hillary v. Gay*, 6 Car. & P. 284.

(*o*) Lit. s. 6S.

of both parties respectively, of the lessee as well as of the lessor, although by the terms of the contract it be expressed to be holden at the will of the lessor only (*p*); so that either party may determine it. But a tenancy at will may also arise by implication of law, as well as by express words. If for instance a tenant enter into possession of lands under a lease which is void, he is tenant at will to the lessor (*q*). If a party be let into possession of land, under a contract for the sale of it, which is not afterwards completed, he is tenant at will to the vendor (*r*). And where a minister of a dissenting congregation, after his election, was placed in possession of a chapel and dwelling-house by certain persons in whom the legal fee was vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship: it was holden that he was a mere tenant at will to those persons, and that his interest was determinable by a demand of possession, without any notice to quit (*s*). If however an annual rent be reserved, it will rebut this implication, and the court will deem it to be a tenancy from year to year (*t*). So, payment of rent for a year will rebut it, and make it a holding from year to year (*u*).

A tenancy at will may be determined, either expressly, or by matter of implication. The mode of determining it expressly, by either party, is by a demand of possession on the part of the lessor, or by an express declaration by the lessee that he will hold no longer; and which if it be made off the land, must be by a notice in writing (*v*). If the lessor determine his will verbally, it must be upon the land (*w*); and where a demand of possession was made upon the premises to the wife of the under-tenant, it was holden to determine the will, and that the lessor might thereupon bring an ejectment (*x*). But a mere verbal declaration of the lessee, that he will not hold the lands any longer, does not determine the estate, unless he also waive the possession (*y*). A determination of the will, however, may be implied from any act of ownership exercised by the lessor, which is inconsistent with the nature of the estate: as if he make a feoffment, and give livery of seisin upon the land, even although the lessee be not present nor assent to it (*z*); or make a lease of the lands, to commence immediately (*a*); or

(*p*) Co. Lit. s. 55. a.

(*q*) *Denn v. Fearnside*, 1 Wils. 176.

(*r*) *Ball v. Cullimore*, 2 Cr. M. & R. 120. *Doe v. Chamberlain*, 9 Law J. 38, ex.

(*s*) *Doe v. Jones et al.*, 10 B. & C. 718. *Doe v. M'Karg*, Id. 721.

(*t*) *Roe v. Rees*, 2 W. Bl. 1171, per De Grey, C. J.

(*u*) *Doe v. Dodd*, 2 Nev. & M. 638.

(*v*) Co. Lit. 55. b.

(*w*) Id.

(*x*) *Roe v. Street*, 4 Nev. & M. 42.

(*y*) Co. Lit. 55. b. 57. a.

(*z*) *Ball v. Cullimore*, 2 Cr. M. & R. 120.

(*a*) *Dinsdale v. Iles*, 2 Lev. 88.

enter upon the land and cut timber (*b*) ; or do any other act showing that he has determined the will :—this has the effect of putting an end to the lessee's interest. So, if he become insolvent, the vesting order and notice thereof to the tenant, will operate as a determination of the tenancy (*c*). And on the other hand, any act of desertion by the tenant, or other act inconsistent with this estate, will operate as a determination of the estate : as if he assign over the land to another, or commit an act of waste, his estate is thereby determined (*d*). But to bind the lessor in such a case, the tenant must give him notice of what he has done ; otherwise it is a determination of the will at the option merely of the lessor (*e*). And lastly, if either party die, or be outlawed, the estate is thereby determined (*f*).

In ejectment against a tenant at will, the lessor of the plaintiff has only to prove the tenancy, and the act by which it was determined ;—which act must appear to have been done before the date of the title in the writ, and within the time limited in that respect by the Statute of Limitations.

Tenancy for life.] If land be let to a man for his own life, and he die, the lessor may immediately commence an ejectment against any person, who may, at the time, be in the occupation of it. So, if land be let to a man for the life of another, and the *cestui que vie* die, and the lessee hold over : the lessee thereupon becomes tenant at sufferance, and the lessor may recover the land from him in ejectment without demand or notice of any kind. In these cases, the lessor of the plaintiff will have merely to prove the tenancy, and the death.

Tenancy for term of years.] If land be let to a tenant for a term of years, the lessor, immediately upon the expiration of the term, may commence an ejectment for the recovery of the land, without any demand or notice. And all the landlord in that case will have to prove, will be the demise :—if by a written lease, he must produce and prove it, or a counterpart of it (*g*) ; if by parol, he must give parol evidence of it ; and care must be taken that it appear from evidence thus given, that the tenancy expired before the day of the demise laid in the declaration.

If the demise were for a certain term, but determinable at a shorter period upon notice : then, besides proving the

(*b*) Co. Lit. 55. b.

(*c*) *Doe v. Thomas*, 20 Law J. 367, ex.

(*d*) Co. Lit. 55. b.

(*e*) *Pinhorn v. Souster*, 22 Law J. 268, ex.

(*f*) Co. Lit. 55. b. 57. a ; 5 Co. 116.

(*g*) *Roe v. Davis*, 7 East, 363.†

demise, the landlord must also prove the notice and the service thereof.

Tenancy from year to year.] Where a man lets lands, &c. to another as tenant from year to year, he cannot bring an ejectment to recover possession of them, until he shall have first determined the tenancy, by giving a notice to quit: for until the tenancy be determined, he has no right of entry. And there is no difference between houses and land in this respect; the same notice must be given in both cases (*h*). As to this notice, see more particularly *ante*, p. 91.

A tenancy from year to year, is either created by express stipulation between the parties, (as where it is agreed between them, that the tenant shall hold from year to year so long as both parties please,) or it is implied by law. If it be agreed that the tenant shall pay so much a year for the premises, without mention of any term, it shall be deemed a tenancy from year to year (*i*). So, upon proof of payment of rent by the tenant, and in the absence of all evidence as to the term, the jury will be directed to presume a tenancy from year to year. So, where the tenant holds over after the expiration of a term for years,—if his landlord receive rent due after the expiration of the term, he thereby creates a new tenancy; and in the absence of evidence of an express stipulation upon the subject, it shall be deemed a tenancy from year to year (*k*). So, if a lease be void as against a remainderman, he has a right of entry presently upon his estate becoming an estate in possession, and he may recover the premises in an ejectment; but if he receive rent from the tenant, he cannot afterwards maintain an ejectment, without giving notice to quit (*l*). But this presumption or implication, like all others, may be rebutted by circumstances, which show the intention of the parties to have been otherwise.

Where a landlord brings an ejectment against a tenant who has holden from year to year, and the tenancy has been determined by a notice to quit,—he must prove:

1. The tenancy, and the time at which the year of the tenancy ended,—by parol or other evidence of the holding, or by proof of an attornment or payment of rent by the tenant (*m*).

2. If the defendant were tenant from year to year to the person under whom the lessor of the plaintiff claims, and had never as yet paid rent to the latter, the derivative title of the lessor of the plaintiff, by descent or purchase, must also be proved.

(*h*) *Right v. Darby*, 1 T. R. 159, 102, 103.

(*i*) See *Doe v. Browne*, 8 East, 106.

(*k*) *Roe v. Ward*, 1 H. Bl. 97.

(*l*) *Doe v. Watts*, 7 T. R. 83. *Doe v. Browne*, 8 East, 106.

(*m*) *Vide infra*.

3. The plaintiff must prove the service of the notice to quit, as directed *ante*, pp. 98, 94. If the notice were attested by a witness, it must be proved by such attesting witness, or his absence accounted for; proof that it was served personally upon the tenant, and that he read it and did not object to it, is not sufficient (*v*). But where a notice is served thus personally upon the tenant, and he makes no objection to it at the time, this is presumptive evidence that the expiration of the year of the tenancy corresponds with the notice, and throws the *onus* of disproving it upon the defendant (*w*). And where a notice was given on the 22nd March to quit at the expiration of the current year of the tenancy, and a declaration in ejectment, laying the demise on the 1st of November, was on the 16th of January following served upon the tenant, who at the time made no objection to the notice to quit, but said he should go out as soon as he could fit himself: this was holden to be *primâ facie* evidence that the tenancy commenced at Michaelmas, and was determined before the day of the demise, it appearing that the rent was payable on the usual quarterly days, but there being no direct evidence of the commencement of the tenancy (*x*). Or if the defendant have expressly admitted at what time the year of the tenancy expires, he shall not afterwards be allowed to contradict his admission (*y*). Where the landlord proved payment of rent by the defendant, and half a year's notice to quit: it was holden that he could not be turned round by his witness proving, on cross-examination, that an agreement relative to the land in question was produced at a former trial between the same parties, and was, on the morning of the then trial, seen in the hands of the plaintiff's attorney, but the contents of which the witness did not know,—no notice having been given by the defendant to produce such paper; for although it might be an agreement relative to the land, it might not affect the matter in judgment, nor even have been made between the present parties (*z*).

See as to the notice to quit, generally, in what cases, by and to whom given, the form and service of it, in what cases and how waived, and how proved,—*ante*, p. 91, &c.

Evidence for the Defendant.

1. In the first place, it is a general principle that a tenant cannot dispute his landlord's title (*a*), whether he hold by

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| (v) <i>Doe v. Durnford</i> , 2 M. & S. 62. | 559. See <i>Oakapple v. Copous</i> , 4 T. R. 361, <i>semb. cont.</i> |
| (w) <i>Doe v. Forster</i> , 13 East, 405. | (y) <i>Doe v. Lambley</i> , 2 Esp. 635. |
| <i>Thomas v. Reece Thomas</i> , 2 Camp. 647. | (z) <i>Doe v. Morris</i> , 12 East, 237. |
| (x) <i>Doe v. Woombwell</i> , 2 Camp. | (a) <i>Fleming v. Gooding</i> , 10 Bing. 549. |
| | <i>Parry v. House</i> , Holt, 489. |
| | <i>Wood v. Day</i> , 7 Taunt. 646. |

deed (*b*), or not, or have merely acknowledged a tenancy by payment of rent (*c*), (unless he can show that he paid it by mistake or from misrepresentation) (*d*), or by payment of rent under a distress (*e*); nor can any person holding under him (*f*). Even where a party, under a fraudulent pretence, borrowed the keys of a house from J. S., and then retained the possession, it was holden that he could not dispute the title of J. S. in an ejectment brought against him by the latter (*g*). Nor can a tenant dispute the title of his landlord, where the ejectment is brought by the landlord's assignee or other person claiming under him (*h*); all he can do is to impeach the derivative title (*i*); and even this he cannot do, if he have paid rent to the assignee.

Nor can a tenant dispute the title of his landlord's landlord (*k*).

But a tenant may show that the title of his landlord is at an end. He may show, after the death of his landlord, that he was only tenant for life (*l*); he may show that his landlord, pending the term, sold his interest (*m*), or mortgaged the premises (*n*); or that his title has expired (*o*); or that the agreement under which the landlord held was put an end to (*p*), or that he has become bankrupt (*q*), or that he was but second mortgagee, and that the first mortgagee has claimed the rent, and compelled the defendant to pay it to him (*r*). So, a mere acknowledgment by a tenant, of the title of a person claiming the demised premises as heir-at-law, will not prevent the tenant from disputing the title of the claimant, if it appear that such acknowledgment was obtained by misrepresentation, or arose from a misapprehension of the nature of the title set up (*s*). Even an attornment, although an admission of a tenancy, and good *prima facie* evidence to support

(*b*) *Taylor v. Needham*, 2 Taunt. 278.

(*c*) *Doe v. Pegge*, 4 Doug. 300; 1 T. B. 760, n. *Doe v. Clarke*, Peake, Ad. Ca. 230. *Francis v. Doe*, in error, 4 Mees. & W. 331.

(*d*) *Rogers v. Pitcher*, 6 Taunt. 202.

(*e*) *Cooper v. Blandy*, 4 Moore & S. 502.

(*f*) *Doe v. Mills*, 2 Ad. & El. 17. *Doe v. Fuller*, 1 Tyr. & Gr. 17. *Doe v. Austin*, 2 Moore & S. 107. *Doe v. Hurton*, 9 Car. & P. 254.

(*g*) *Doe v. Blayup*, 3 Ad. & El. 188.

(*h*) *Rennie v. Robinson*, 1 Bing. 147. *Doe v. Abrahams*, 1 Stark. 303.

(*i*) See *Phillips v. Pearce*, 5 B. & C. 433.

(*k*) *Barwick v. Thompson*, 7 T. R. 488.

(*l*) *Doe v. Seaton*, 2 Cr. M. & R. 728.

(*m*) *Doe v. Watson*, 2 Stark. 230.

(*n*) *Doe v. Edwards*, 6 Car. & P. 208.

(*o*) *Neuve v. Moss*, 1 Bing. 300. *England v. Slade*, 4 T. R. 682. *Doe v. Ramsbottom*, 3 M. & S. 516. *Farmer v. Duplock*, 2 Bing. 10.

(*p*) *Brook v. Biggs*, 2 Bing. N. C. 572.

(*q*) *Doe v. Browne et al.*, 7 Ad. & El. 447; 8 Law J. 49, qb.

(*r*) *Doe v. Barton et al.*, 9 Law J. 57, qb.

(*s*) *Gregory v. Doidge*, 3 Bing. 474.

an avowry against the party for rent (*t*), does not prevent him from disputing the title of the person to whom he has attorned; for he may by mistake have attorned to one who has no title (*u*).

Or, admitting the title of the landlord, the tenant may prove that the tenancy has not been determined: that the action was commenced before the expiration of the year of the tenancy; that the day on which the notice required him to quit, was not the day on which the year of the tenancy expired (*v*); that the notice was not served half a year before the commencement of the action, or before the date of the title in the writ (*w*); or that the notice to quit had been subsequently waived (*x*). Where one tenant in common brought an ejectment against his three co-tenants and a railway company to whom the latter had demised the premises, and the three co-tenants defended as landlords, and the company as tenants; it was proved at the trial that rent had formerly been paid to all the tenants in common by certain other persons, and there was no evidence to show that any notice to quit had been given, or that such tenancy had been otherwise determined: it was holden that the railway company, who defended as tenants, were not precluded, by the order admitting the landlords to defend, from insisting that the former tenancy still existed, and that therefore the legal title was not in the lessor of the plaintiff on the day of the demise (*y*).

2. *Proceedings in the Action.*

Writ and Notice, in what cases.] Where the term or interest of any tenant, now or hereafter holding under a lease or agreement in writing any lands, tenements, or hereditaments for any term or number of years certain, or from year to year, shall have expired, or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession,—it shall be lawful for him, at the foot of the writ in ejectment, to address a notice to such tenant or person, requir-

(*t*) *Gravenor v. Woodhouse et al.*,
1 Bing. 38; 2 Id. 71.

(*u*) *Cornish et al. v. Searell*, 8
B. & C. 471.

(*v*) See *ante*, p. 94.

(*w*) See *ante*, p. 96.

(*x*) See *ante*, p. 96.

(*y*) *Doe v. Horn et al.*, 3 Mees.
& W. 333.

ing him to find such bail, if ordered by the court or judge, and for such purposes as are hereinafter specified (z).

And in all actions of ejectment hereafter to be brought in any of Her Majesty's courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments in any county, except London or Middlesex, where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord, in or after Hilary or Trinity Terms respectively, it shall be lawful for the claimant in any such action, at any time within ten days after such tenancy shall expire or right of entry accrue as aforesaid, to serve a writ in ejectment in the form contained in the schedule A. to this Act annexed, marked No. 13, except that it shall command the persons to whom it is directed to appear within ten days after service thereof in the court in which such action may be brought; and the like proceedings shall be had, as hereinbefore provided, save that it shall be sufficient to give six clear days' notice of trial to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; and any defendant in such action may, at any time before the trial thereof apply to a judge by summons to stay or set aside the proceedings, or to postpone the trial until the next assizes; and it shall be lawful for the judge in his discretion to make such order in the said cause as to him shall seem expedient (a).

Bail or Judgment.] Upon the appearance of the party, on an affidavit of service of the writ and notice, it shall be lawful for the landlord, producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid,—to move the court, or apply by summons to a judge at chambers, for a rule or summons for such tenant or person to show cause, within a time to be fixed by the court or judge on a consideration of the situation of the premises, why such tenant or person should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the claimants in the action;—and it shall be lawful for the court or judge upon cause shown, or upon affidavit of the service of the rule or summons in case no cause shall be shown, to make the

(z) 15 & 16 Vict. c. 76, s. 213.

(a) *Id.* s. 217.

same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute;—and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the court or judge to enlarge the time for obeying the same, then the lessor or landlord, filing an affidavit that such rule or order has been made and served and not complied with, shall be at liberty to sign judgment for recovery of possession and costs of suit in the form contained in the schedule A. to this Act annexed, marked No. 21, or to the like effect (b).

Mesne profits.] Wherever it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the judge before whom such cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the writ in ejectment, to go into evidence of the mesne profits thereof which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial, finding for the claimant, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession and costs, but also for the mesne profits found by the jury: provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment (c).

Judgment, &c., stayed upon terms.] In all cases in which such security shall have been given as aforesaid, if upon the trial a verdict shall pass for the claimant,—unless it shall appear to the judge before whom the same shall have been had that the finding of the jury was contrary to the evidence, or that the damages given were excessive,—such judge shall not,

except by consent, make any order to stay judgment or execution, except on condition that within four days from the day of the trial the defendant shall actually find security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned—not to commit any waste, or act in the nature of waste, or other wilful damage,—and not to sell or carry off any standing crops, hay, straw, or manure produced or made (if any) upon the premises, and which may happen to be thereupon,—from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be: provided always, that the recognizance last above mentioned shall immediately stand discharged and be of no effect, in case proceedings in error shall be brought upon such judgment, and the plaintiff in error shall become bound in the manner hereinbefore provided (d).

And all recognizances and securities entered into as last aforesaid may and shall be taken respectively in such manner and by and before such persons as are provided and authorized in respect of recognizances of bail upon actions and suits depending in the court in which any such action of ejectment shall have been commenced; and the officer of the same court with whom recognizances of bail are filed shall file such recognizances and securities, for which respectively the sum of two shillings and six pence, and no more, shall be paid; but no action or other proceeding shall be commenced upon any such recognizance or security after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord (e).

Summary Proceedings before Justices of the Peace, to obtain Possession after Tenancy determined.

In what cases, and the notice.] When and so soon as the term or interest of the tenant of any house, land or other corporeal hereditaments, held by him at will or for any term not exceeding seven years, either without being liable to the payment of any rent, or at a rent not exceeding the rate of twenty pounds a year, and upon which no fine shall have been reserved or made payable, shall have ended, or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof,) any person by whom the same or any part thereof shall be then actually occupied,

(d) 15 & 16 Vict. c. 76, s. 215.

(e) *Id.* s. 216.

shall neglect or refuse to quit and deliver up possession of the premises, or such part thereof respectively, the landlord of the said premises or his agent may cause the person so neglecting or refusing to quit and deliver up possession, to be served (in the manner hereinafter mentioned) with a written notice, in the form set forth in the schedule to this Act, signed by the said landlord or his agent, of his intention to proceed to recover possession, under the authority and according to the mode prescribed in this Act (a).

As to the tenancy here mentioned, namely a tenancy at will or any term not exceeding seven years: A tenancy at will is determined by a mere demand of possession, or by entry upon the tenement demised for that purpose. The term not exceeding seven years, here mentioned, is either a tenancy for a time certain, or a tenancy from year to year. If it be a tenancy for a time certain, there is no necessity for a notice to quit, but the term determines immediately as soon as the time expires. But if it be for a time certain, but determinable at a shorter period upon notice, then a notice must be given, in strict conformity with the stipulation in the demise. So, in the case of a tenancy from year to year (whether the rent be reserved yearly or otherwise), it cannot be determined except by a notice to quit, given at least half a year previously, and ending with the year of the tenancy: as if the tenant hold from Christmas to Christmas, the notice must be given half a year at least before Christmas, to quit at Christmas. And the same where a tenancy from year to year is implied by law, from holding over, from holding under a mere agreement, or void lease, or from the payment of rent, or the like. In like manner, if the tenancy be from half-year to half-year, half a year's notice to quit must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice; and if from week to week, a week's notice:—if there be no express stipulation to the contrary. A mistake in the notice, as to the time of the expiration of the tenancy, is fatal; but in order to avoid this, the notice now usually requires the tenant to quit at the end and expiration of the current year of his tenancy, which shall expire next after the end of one half year from the date of the notice. See as to this notice to quit, by and to whom to be given, the form and service of it, in what cases and how waived, and how proved,—*ante* p. 91, &c.

The following is the form of the notice of the intended application, as given in the schedule to the Act:—

Notice.

I — [owner, or agent to — the owner, *as the case may be*] do hereby give you notice, that unless peaceable possession of the tenement [*shortly describing it*] situate — which was held of me, or of the said — [*as the case may be*] under a tenancy from year to year, [*or as the case may be*] which expired [*or was determined by notice to quit from the said — [or otherwise as the case may be]*] on the — day of —, and which tenement is now held over and detained from the said —, be given to — [the owner or agent] on or before the expiration of seven clear days

from the service of this notice, I — shall on — next, the — day of —, at — of the clock of the same day, at —, apply to her Majesty's justices of the peace acting for the district of — [*being the district, division, or place in which the said tenement or any part thereof is situate,*] in petty sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom.

Dated —. (*Signed*)
To Mr. — [Owner or agent.]

Such notice may be served, either personally, or by leaving the same with some person being in and apparently residing at the place of abode of the person so holding over as aforesaid, and the person serving the same shall read over the same to the person served, or with whom the same shall be left as aforesaid, and explain the purport or intent thereof: provided that if the person so holding over cannot be found, and the place of abode of such person shall either not be known or admission thereto cannot be obtained for serving such summons, the posting up of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person (*b*).

Application and warrant to give possession.] And if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices hereinafter mentioned, reasonable cause why possession should not be given under the provisions of this Act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to such justice proof of the holding, and of the end or other determination of the tenancy, with the time or manner thereof, and (where the title of the landlord has accrued since the letting of the premises,) the right by which he claims the possession; and upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district,

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division, or place within which the said premises, or any part thereof, shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district, division or place, within which the said premises, or any part thereof, shall be situate, commanding them, within a period to be therein named, not less than twenty one, nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent : provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday, or Christmas Day, or at any time except between the hours of nine in the morning and four in the afternoon ; provided also, that nothing herein contained shall be deemed to protect any person, on whose application and to whom any such warrant shall be granted, from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession, where such person had not at the time of granting the same, lawful right to the possession of the same premises : provided also that nothing herein contained shall affect any rights to which any person may be entitled as out-going tenant by the custom of the country or otherwise (c).

The following is the form of the complaint, as given in the schedule to the Act :—

Complaint.

The complaint of — [owner or agent, &c., *as the case may be*] made before us, two of her Majesty's justices of the peace acting for the district of —, in petty sessions assembled, who saith that the said — did let to — a tenement consisting of —, for —, under the rent of —, and that the said tenancy expired [or was determined by notice to quit, given by the said —, *as the case may be*] on the — day of —, and that on the — day of — the said — did serve on — [the tenant

overholding] a notice in writing of his intention to apply to recover possession of the said tenement (a duplicate of which notice is hereto annexed) by giving, &c., (*describing the mode in which the service was effected*;) and that notwithstanding the said notice, the said — refused [or neglected] to deliver up possession of the said tenement, and still detains the same.

(Signed)

Taken the — day of — before us
(Signed)

A duplicate of the notice of intention to apply, is to be annexed to this complaint.

The following also is the form of the warrant to the peace officer, to take and give possession :—

Warrant.

Whereas [set forth the complaint.] We two of her Majesty's justices of the peace in petty sessions assembled, acting for the — of —, do authorize and command you, on any day within — days from the date hereof [except on Sunday, Christmas Day, and Good Friday, to be added if necessary,] between the hours of nine in the forenoon and four in the afternoon, to enter (by force, if needful) and with or without the aid of — the owner or agent [as the case may

be,] or any other person or persons whom you may think requisite to call to your assistance, into and upon the said tenement and to eject thereout any person, and of the said tenement full and peaceable possession to deliver to the said — [the owner or agent.]

Given under our hands and seals this — day of —

To — and all other constables and peace officers acting for the district of —

Warrant, when stayed.] In case any such tenant or occupier will become bound with two sureties as hereinafter provided, to be approved of by the said justices, in such sum as to them shall seem reasonable, regard being had to the value of the premises and to the probable costs of an action, to sue the person to whom such warrant was granted with effect and without delay, and to pay all the costs of the proceeding in such action, in case a verdict shall pass for the defendant, or the plaintiff shall discontinue or not prosecute his action or become nonsuit therein, execution of the warrant shall be delayed until judgment shall have been given in such action of trespass; and if upon the trial of such action of trespass a verdict shall pass for the plaintiff, such verdict and judgment thereupon shall supersede the warrant so granted, and the plaintiff shall be entitled to double costs in the said action of trespass (d),—which now means “full and reasonable indemnity as to all costs, charges and expenses incurred” by the plaintiff (e).

Every such bond shall be made to the landlord or his agent, at the costs of such landlord or agent, and shall be approved of and signed by the said justices (f).

No action against justices, &c.] It shall not be lawful to bring any action or prosecution against the said justices by whom such warrant as aforesaid shall have been issued, or against any constable or peace officer by whom such warrant may be executed, for issuing such warrant or executing the same respectively, by reason that the person on whose application the same shall be granted had not lawful right to the possession of the premises (g). But an action of trespass will lie against the landlord, for obtaining a warrant, and turning the tenant out of possession, if it turn out that such landlord at the time had no right to the possession (h).

(d) 1 & 2 Vict. c. 24, s. 3.

(e) 5 & 6 Vict. c. 97, s. 2.

(f) 1 & 2 Vict. c. 4, s. 4.

(g) 1 & 2 Vict. c. 4, s. 5.

(h) *Darlington v. Pritchard*, 12 Law J. 34, cp.

PART III.

THE LANDLORD'S REMEDIES AGAINST STRANGERS.

CHAPTER I. *For Evicting, or attempting to Evict his Tenant.*

CHAPTER II. *For Injuries to his Reversion.*

CHAPTER III. *Landlord's Remedies against the Sheriff.*

SECT. 1. *Action for not taking a Replevin Bond.*

2. *Action for taking insufficient Pledges in Replevin.*

3. *Action, &c. for Rent, under an Execution against the Tenant.*

CHAPTER IV. *Landlord's Remedy against Pledges in Replevin.*

CHAPTER I.

The Landlord's Remedies for Evicting, or attempting to Evict his Tenant.

Ouster of Tenant.] An ouster of chattels real is, where a tenant for term of years is wrongfully turned out of possession. The tenant's remedy is, either by action of trespass to recover damages,—or by ejectment, and trespass for mesne profits, to recover possession and also damages. The action of ejectment is always adopted, where any material part of the term is unexpired, and the plaintiff's title is clear; the action of trespass is adopted, where the plaintiff's title is doubtful, or where the term is likely to expire before the ejectment would be determined.

Or if the tenant do not adopt ejectment, the landlord may do so; in which case it will be prudent for him to state himself and his tenant to be claimants in the writ.

Ejectment against tenant.] An ejectment is brought by serving a writ in the action upon the tenant in possession: if he appear and defend the action, the parties proceed

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to trial, and the right of possession is determined, upon the proof or failure of proof of the title of the plaintiff; but if the tenant do not appear and defend, the plaintiff, on making an affidavit of service of the writ, is then entitled to judgment, and to possession of the premises. And as great inconveniences had frequently happened to landlords, by their tenants secreting declarations in ejectment, which had been delivered to them, or by refusing to appear to such ejectments, or to suffer their landlords to take upon them the defence: it is enacted, by stat. 15 & 16 Vict. c. 76, s. 209, that "every tenant, to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord or his bailiff or receiver, under penalty of forfeiting three years' improved or rackrent of the premises demised or holden in the possession of such tenant, to the person of whom he holds,—to be recovered by action in any court of common law having jurisdiction for the amount." The improved or rackrent here mentioned is not the rent reserved as between the landlord and the tenant, but the rent at which the premises would let to a tenant, at the time of the service of the writ in ejectment (z). And it has also been decided, that the landlord might maintain his action for three years' improved value, not merely of the lands actually demised to the tenant, but of certain mines, also, in which the tenant had liberty to dig, and which by his concurrence were taken by the sheriff under the writ of possession (a).

If by the fraud or negligence of the tenant, as above mentioned, a stranger acquire possession of the demised premises, the landlord will be obliged to bring an ejectment, to recover the possession; in which action it may be prudent (as already mentioned) that the writ should state both the landlord and the tenant to be claimants, to prevent the unexpired-term of the latter from being set up as a defence.

But if the tenant deliver the declaration to the landlord, or the landlord otherwise become acquainted with the fact of the tenant's having been served with it, then, by stat. 15 & 16 Vict. c. 76, s. 172, by leave of the court or a judge, he may be allowed to appear and defend, on filing an affidavit showing that he is in possession of the land by his tenant. And by sect. 173, any person appearing to defend as landlord, in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord; and such person shall be at liberty to set up any defence which a landlord appearing in an action of ejectment

(z) *Crocker v. Fothergill*, 2 B. & A. 652.

(a) *Crocker v. Fothergill*, 2 B. & A. 652.

has heretofore been allowed to set up, and no other. And heretofore a landlord allowed to defend, could only set up the same defence that the tenant might have set up, if he had defended. And in this case, and indeed in all cases where a person not named in the writ has obtained leave of the court or a judge to appear and defend, he shall enter an appearance according to the statute, intituled in the action against the party or parties named in the writ as defendant or defendants, and he must forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff if he sue in person (*b*). The stat. 11 G. 2, c. 19, s. 13, made a similar provision for allowing the landlord to defend an action of ejectment brought against his tenant. And upon that statute, the courts have allowed this to be done, after the tenant had suffered judgment to be signed against him by default (*c*); and even after judgment, and execution executed, where the tenant appeared to have colluded with the lessor of the plaintiff (*d*), or where by mistake of the tenant the declaration had not been delivered to the landlord (*e*).

But where a plaintiff had obtained judgment and possession in an undefended ejectment, without collusion, and had sold part of the premises and transferred the possession: the court refused to let the landlord in to defend (*f*). And in a similar case, where there was no suggestion of collusion, and where it did not appear how the applicant was landlord, or when he became so, or whether he had ever received rent for the premises, the court refused to interfere after judgment and execution (*g*). So a third person will not be allowed to defend as landlord, where it appears that the tenant in possession came in as tenant of the plaintiff, even although the agreement under which he held has expired (*h*). But where the landlord, without having himself made a defendant, defrayed the expense of defending an ejectment in the name of his tenant, and the tenant, who was an illiterate man, gave the plaintiff's attorney a retraxit of the plea and a cognovit, the court upon application set them aside, and let the landlord in to defend (*i*). And on the other hand, where the landlord was admitted to defend alone, and died pending the action, having devised all his real estates to B., the court upon application, (it appearing that the statute of limitations would prevent the plaintiff from bringing a fresh eject-

(*b*) Rule Gen. 113.

(*c*) *Doe d. Meyrick v. Roe*, 2 Cr. & J. 682.

(*d*) *Doe d. Grocers' Company v. Roe*, 5 Taunt. 206.

(*e*) *Doe d. Butler v. Roe*, 2 Har. & W. 131; and see *Doe d. Throughton v. Roe*, 4 Burr. 1996.

(*f*) *Goodtitle v. Badtitle*, 4 Taunt. 820.

(*g*) *Doe d. Martin v. Roe*, 1 Hodg. 223. Semb. S. C. nom. *Doe d. Thompson v. Roe*, 4 Dowl. 116.

(*h*) *Doe v. Smythe*, 4 M. & S. 347.

(*i*) *Doe v. Franklin*, 7 Taunt. 9; and see *Doe v. Dyer*, 3 Dowl. 696.

ment,) gave him leave to sign judgment against the casual ejector, and to issue execution thereon, unless B. would appear and defend the action as landlord (*k*).

But although the landlord is usually the person making application for leave to defend, the courts are liberal in their permission in this respect, and will allow an heir to come in and defend, although he have never been in possession (*l*), at least if his ancestor were last seised (*m*); or a remainderman, if the particular tenant were last seised (*n*); or a devisee in trust, although he have never been in possession, unless the plaintiff will consent to have the validity of the will tried in an issue of *devisavit vel non* (*o*); or a mortgagee to defend, with the mortgagor (*p*), but not by himself (*q*).

The rule in this case allows the landlord to defend with the tenant, if the latter appear; or if he do not, then that the landlord may appear and defend alone (*r*). If there be several actions by the same claimant against several tenants, the landlord must obtain a rule or order in each; he cannot treat them as one action (*s*).

Where a landlord is thus let in to defend, he will not be allowed at the trial to object that the occupiers have not received notice to quit from the lessor of the plaintiff (*t*). And on the other hand, he cannot avail himself of any defence, which the tenant would have been precluded from setting up (*u*).

CHAPTER II.

The Landlord's Remedy for Injury to his Reversion.

In what cases.] In all cases where there are tenant and reversioner of lands or houses, &c.,—for all injuries to the land or house, &c., for which the tenant may maintain either trespass or case, the reversioner may maintain case, if the

(*k*) *Doe v. Grubb*, 5 B. & C. 457.
(*l*) *Doe d. Heblethwaite v. Roe*, 3 T. R. 783, n.

(*m*) Per *Ld. Kenyon*, 3 T. R. 783.

(*n*) Per *Ld. Kenyon*, *Id.*

(*o*) *Lovelock v. Doncaster*, 4 T. R. 122; see 3 T. R. 783.

(*p*) *Doe v. Cooper*, 8 T. R. 645.

(*q*) *Semb. Id.*

(*r*) See *Doe v. Bennett*, 4 B. & C. 897.

(*s*) See *Doe d. Faithful v. Roe*, 7 Dowl. 718."

(*t*) *Doe v. Creed*, 5 Bing. 327.

(*u*) *Doe v. Birchmore et al.*, 8 Law J. 108, qb. *Doe v. Mizen*, 2 Moody & R. 56, and see *ante*, p. 234.

injury be of such a permanent nature as to be prejudicial to the reversion (*v*). Thus a landlord may maintain an action on the case against a stranger, for obstructing the lights of his house, in the occupation of his tenant (*w*); for if the landlord wished to sell his reversion, such an obstruction would lessen the value of it (*x*). So, a landlord may sue for an injury done to his house, in the occupation of a tenant, arising from the defendant's neglect to scour a water-course in a close adjoining, by reason of which the water-course was obstructed, the water poured back, and the water from the course ran into the house, and damaged it (*y*); or for an injury done to it, by mining under it (*z*); or for an injury done to it, by raising the pavement so much in front of it, as to block up the entrance and the lower windows of it (*a*). So, where a person built the roof of his house with eaves, which discharged the rain water by means of a spout into an adjoining yard, belonging to the plaintiff, but in the occupation of a tenant,—this was holden such an injury to the reversion, for which the landlord might maintain an action (*b*).

But a landlord cannot maintain an action on the case against a stranger, merely for entering upon his land in the occupation of a tenant, although that entry was made in exercise of an alleged right of way:—such an act, during the tenancy, not being necessarily injurious to the reversion (*c*). And where two houses were connected by a party wall, and the owner of one of them pulled down his house, without shoring up that of his neighbour, in consequence of which the latter house was injured, and partly fell down: it was holden that the landlord of the latter, could not maintain an action on the case against the owner of the former, to recover damages for this injury, without proving that he had a right to have his house supported by the defendant's house, or that he was entitled to previous notice of the pulling down of the house, in order that he might have an opportunity himself of shoring up the house in the occupation of his tenant (*d*).

(*v*) 1 Arch. N. P. 593.

(*w*) *Shadwell v. Hutchinson*, 2 B. & Ad. 97, *Moody & M.* 350. *Turner et al. v. Sheffield and Rotherham Railway Co.*, 10 Mees. & W. 423.

(*x*) *Jesser v. Gifford*, 4 Burr. 2141.

(*y*) *Bell v. Twentyman*, 1 Q. B. 766.

(*z*) *Raine v. Alderson*, 4 Bing. N. C. 702.

(*a*) *Leader v. Moxon et al.*, 3 Wils. 461.

(*b*) *Tucker v. Newman*, 11 Ad. & El. 40.

(*c*) *Baxter v. Taylor*, 4 B. & Ad. 72.

(*d*) *Peyton et al. v. Mayor of London*, 9 B. & C. 725.

Declaration.

In the Queen's Bench.

The — day of — 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, a certain messuage and dwelling-house was in the possession and occupation of one G. H., as tenant thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff: Yet the defendant on —, and on

divers other days and times between that day and the day of commencing this action, wrongfully and unjustly, without the leave or licence and against the will of the plaintiff, [*here state the trespass, nuisance or other subject of complaint:*] By means of which said several premises, he the plaintiff has been and is greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said messuage and dwelling-house. And the plaintiff claims £ —.

The declaration must either allege the act to have been done, to the damage of the reversion, or must state an injury of such a permanent nature as to be necessarily injurious to the reversion,—otherwise the defendant may demur or move in arrest of judgment. Therefore where the plaintiff declared as reversioner of a yard and part of a wall, which E. F. occupied as tenant to him, and that the defendant on, &c. and on divers days, &c. wrongfully placed on the said part of the wall quantities of bricks and mortar, &c., and thereby raised it to a greater height than before, and placed divers pieces of timber, &c. on the said wall, overhanging the yard: by means of which said several premises the plaintiff during all the time lost the use of the said part of the wall, and also by means of the timber, &c. overhanging the yard, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and the said part of the wall have been injured, to the damage of the plaintiff, &c.,—without stating that his reversion was prejudiced:—the court, upon application, arrested the judgment (*d*).

General Issue and Evidence.

In the Queen's Bench.

The — day of — A.D. 18—.

C. D. } The said defendant, by L. M., his attorney, says that he is not
ats. } guilty.
A. B. }

Evidence.

Under this plea, the plaintiff must prove the wrongful act alleged to be done (*e*); and the tenant or occupier of the premises will be a competent witness to prove it (*f*).

General Traverses.

If the defendant would put the plaintiff to the proof of any part of the inducement in the declaration, he must traverse it. If he traverse the tenancy, the plaintiff must prove it; and in that case, if the demise were in writing, the plaintiff must produce and prove it in the ordinary way (*g*). Where the declaration stated the premises to be in the occupation of S. P., as tenant thereof to the plaintiff, and it was proved that the premises had been let to S. P. by a *cestui que* trust, to whom he had paid rent, the plaintiff being the trustee: this was holden to be no variance, as the legal estate was in the plaintiff, and the *cestui que* trust must be deemed his agent or bailiff for the letting of the premises (*h*). And an averment that the premises were in the occupation of A. B. and C. D., is proved, by showing that they were in the occupation at the time of the injury, though the tenancy had been since changed before action brought (*i*).

Special Pleas.

The defendant may in general plead any special plea, which would be an answer to an action by the tenant in possession for the same injury (*k*). But where the action was brought for permitting a water-course on the defendant's premises to be obstructed, for want of proper cleansing, whereby the water was penned back, and ran into and damaged the plaintiff's house,—it was holden to be no plea to say that a wall, part of the plaintiff's premises, and near unto the water-course, became ruinous by the neglect of the plaintiff's tenant in possession, and fell into the water-course and obstructed the

(*e*) Rule Pl. II. 1853, s. 16.

(*f*) *Doddington v. Hudson*, 1 Bing. 257. 6 & 7 Vict. c. 85, s. 1.

(*g*) *Cotterill v. Hobby*, 4 B. & C. 405.

(*h*) *Vallance v. Savage*, 7 Bing. 505.

(*i*) *Vowles v. Miller*, 3 Taunt. 137.

(*k*) See *Foulkes v. Scarfe et al.*, 4 Man. & Gr. 120, 1 Dowl. N. C. 091.

same ; for unless it could be shown that the plaintiff was bound to keep the wall in repair, he could not be answerable for any injury done by it ; and a default in the tenant, could be no answer to an action by the landlord (l). So, it is no answer to say, that he repaired, &c. as soon as he had notice of the injury, or as soon as possible after the injury ; for he became liable to the action, at the very time the injury occurred (m). So, where the action was for an injury occasioned by the non-repair of a gutter running through a close of the plaintiff to the defendant's mill, whereby the water oozed through, and carried away the soil of the close : it was holden no plea to say that the gutter became out of repair, in consequence of the wrongful act of the tenant in possession of the close, in penning back the water for the purpose of watering his meadow (n). So, where a landlord brought an action for an injury to his reversion in a house, by obstructing the lights, and obtained only nominal damages, on the ground that the obstruction could be immediately removed ; afterwards, the obstruction not being removed, he brought a second action, to which the defendant pleaded the judgment in the former action : it was argued for the defendant, that although the tenant in possession might bring successive actions for the continuance of such a nuisance, yet the landlord could not ; for as he claimed damages for the injury to his reversion, he could not have damages twice assessed for the one injury : but the court held that if the creating of the obstruction in the first instance was an injury to the reversion, the continuance of it must be so likewise ; the continuance would, in fact, render the proof of title more difficult at a future time, notwithstanding the former recovery (o).

CHAPTER III.

The Landlord's Remedies against the Sheriff.

SECTION I.

Action against the Sheriff, for not taking a Replevin Bond.

By stat. 11 G. 2. c. 19, s. 22, to prevent vexatious replevins of distresses taken for rent, it is enacted that "all sheriffs and

(l) *Bell v. Twentyman*, 1 Q. B. 766.

(m) *Id.*

(n) *Ld. Egremont v. Pulman*, Moody & M. 404.

(o) *Shadwell v. Hutchinson*, 7 B. & Ad. 97.

other officers, having authority to grant replevins, may and shall, in every replevin of a distress for rent, take in their own names, from the plaintiff and two responsible persons as sureties, a bond in double the value of the goods distrained, (such value to be ascertained by the oath of one or more credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorized and required to administer,) and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained in case a return shall be awarded,—before any deliverance be made of the distress; and that such sheriff or other officer as aforesaid, taking any such bond, shall, at the request and costs of the avowant or person making conuizance, assign such bond to the avowant or person aforesaid, by indorsing the same and attesting it under his hand and seal in the presence of two or more credible witnesses, which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereupon; and if the bond so taken and assigned be forfeited, the avowant or person making conuizance may bring an action and recover thereupon in his own name; and the court where such action shall be brought may by a rule of the same court give such relief to the parties upon such bond as may be agreeable to justice and reason, and such rule shall have the nature and effect of a defeazance to such bond."

The landlord's remedy against the sheriff, if he neglect to take a replevin bond before he replevies goods distrained, is, by action on the case. Where a landlord applied for an attachment against the sheriff, for not taking a replevin bond, the court refused it, saying that his proper remedy was by action (*p*).

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by G. H., his attorney, sues C. D., the defendant in this suit: For that the said plaintiff heretofore, to wit, on —, in a certain close, situate, &c., took and distrained divers [large quantities of potatoes, then planted and growing in the said close,] of great value, to wit, of the value of £— as a distress for certain arrears of rent, to wit, for the sum of £—,

then due and owing from one E. F., to the plaintiff, for the rent of the said premises, by virtue of a certain demise thereof theretofore made to the said E. F., rendering rent for the same. And the plaintiff then detained the said [potatoes] so taken and distrained, until the defendant, then being sheriff of the said county of —, afterwards, to wit, on — aforesaid and within his bailiwick as such sheriff, on the complaint of the said E. F., caused the said goods and chattels

to be replevied and delivered to the said E. F., and then made deliverance of the said distress to the said E. F. And the plaintiff saith that at the then next county court holden in and for the — of —, on —, the said E. F. did appear, and then in the same court, levied his plaint against the plaintiff for the taking and unjustly detaining of the said goods and chattels; and afterwards, to wit, on — last aforesaid, the plaintiff did duly appear in and before the said court to answer the said E. F. in the plea of his said plaint; and such proceedings were thereupon had in the said plea, that afterwards, to wit, at the next county court, holden in and for the said —, on — aforesaid, the said E. F. did not duly prosecute his suit, and it was then duly adjudged in and by the said last mentioned court, that the said E. F. should return to the said A. B. the said goods and chattels, and should pay to the clerk of the court the sum of — costs of suit. And although it was the duty of the defendant as such sheriff as aforesaid, before his making deliverance of the said distress, to the said E. F.,

as aforesaid, to take from the said E. F. and two responsible persons as sureties, a bond in double the value of the said goods and chattels so distrained, conditioned for the prosecuting of the suit of replevin of the said E. F., for the taking of the said goods and chattels, with effect and without delay, and for duly returning the goods and chattels so distrained, in case a return should be awarded,—nevertheless the defendant, so being such sheriff as aforesaid, not regarding his duty in that behalf, did not, before his making deliverance of the said distress to the said E. F., as aforesaid, take from the said E. F., and two responsible persons as sureties as aforesaid, such a bond as aforesaid, conditioned as aforesaid, but wrongfully and injuriously wholly omitted and neglected so to do. And the plaintiff in fact saith, that he hath not as yet obtained a return of the said goods and chattels so distrained as aforesaid, or any or either of them, or any part thereof, and the said arrears of rent have not, nor hath any part thereof, as yet been paid to him the plaintiff. And the plaintiff claims £—.

If there be any difficulty in proving that the sheriff did not take a replevin bond, add a count for his not having assigned the bond upon request, if that be the fact.

General Issue.

In the Queen's Bench.

The — day of — A. D. 18—.

C. D. } The said defendant, by L. M., his attorney, says that he is not
ats. } guilty.
A. B. }

Evidence.

By Rule Pl. H. 1853, s. 16, in actions on the case, the plea of Not Guilty shall operate as a denial only of the breach of duty or wrongful act, alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declara-

tion. Under this plea, therefore, the plaintiff will have to prove,—

1. That the defendant did not take any replevin bond. General evidence of this negative will be sufficient, the defendant having it in his power to prove the affirmative; and the plaintiff may, if he will, call the under-sheriff or replevin clerk, who would have taken such bond, if any were taken, to prove that none was taken.

2. If a count be added for not assigning the bond, evidence must be given of an application at the sheriff's office for such assignment, and that it was refused. This also may be used as some evidence, that no bond was in fact given.

3. The damages. And for this purpose it is necessary to prove the single value of the goods replevied; for to the extent of the double value the defendant will be liable (*a*). The plaintiff should also prove the amount of rent in arrear at the time of the distress, if that be not already found in the replevin suit; for beyond that amount, and the costs in the replevin suit, he will not be entitled to recover.

4. That a writ *de retorno habendo* was sued out in the replevin suit, and *nihil* returned; and that the rent and the costs of the replevin suit have not been paid.

General Traverse.

The only matter in the inducement, seemingly, which the defendant may traverse, is, the fact of the defendant having replevied the goods; for a traverse of the distress, or of the rent being due, would, it seems, be immaterial. And the fact of the replevin may be proved by the under-sheriff or replevin clerk, who made it.

SECTION II.

Action against the Sheriff, for taking Insufficient Pledges in Replevin.

In what cases.] The stat. 11 G. 2, c. 19, s. 22, requires, "all sheriffs and other officers, having authority to grant replevins," to take from the party replevying "and two responsible persons as sureties," a bond in double the value of the goods distrained, conditional in manner mentioned in the Act (*b*). If he neglect his duty in this respect, the landlord's

(*a*) See 11 G. 2, c. 19, s. 22; (*b*) *Ante*, p. 241.
ante, p. 240; and see the next section.

only remedy is by action upon the case against the sheriff, whose under-sheriff or replevin clerk took the bond. The court will not interfere, by rule, to make the sheriff pay even the costs incurred by the landlord in the replevin suit (c). An action on the case will also lie against the sheriff, if he lose the replevin bond; and this even although the landlord, the defendant in the replevin suit, elected to proceed on stat. 17 C. 2, c. 7, and to have judgment for the arrears, instead of having judgment *de retorno habendo* (d).

This action, for taking insufficient pledges, may be brought after the avowant, or person making cognizance, has sued the principal and sureties in the replevin bond, and they have been found insolvent or insufficient; for taking an assignment of the replevin bond, is no waiver of any proceedings against the sheriff, as it is in the case of a bail bond (e).

By and against whom.] The action must be brought by the avowant in the replevin suit, if there have been an avowry, or if not, then by the party making cognizance (f).

The action must be brought against the sheriff or principal, who, or whose deputy, replevied the goods. By stat. of Marlbridge (52 H. 3), c. 21, the authority to make replevins was given to sheriffs; and by stat. 1 & 2 Ph. & M., c. 18, they are required each to make four deputies for this purpose, at different places in their bailiwick, not distant more than twelve miles from each other. But mayors of boroughs, in some instances, have this authority, either by custom or by charter (g).

Declaration.

In the Queen's Bench.

The — day of —, A.D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that whereas the said plaintiff heretofore, to wit, on —, in a certain close, situate, &c., took and distrained divers [large quantities of potatoes, then planted and growing in the said close,] of great value, to wit, of the value of £—, as a distress for certain arrears of rent, to wit, for the sum of £— of like lawful money, then due and owing from

one G. H. to the plaintiff, for the rent of the said premises, by virtue of a certain demise thereof theretofore made to the said G. H., rendering rent for the same. And the plaintiff then detained the said [potatoes] so taken and distrained for the cause aforesaid, until the defendant, then being sheriff of the said county of —, afterwards, to wit, on — aforesaid, and within his bailiwick as such sheriff, on the complaint of the said G. H., caused the said goods and chattels to be replevied and delivered to the said G. H., and then made deliverance

(c) *Tesseyman v. Gildart*, 1 New Rep. 292.

(d) *Perreau v. Beavan*, 5 B. & C. 284.

(e) 1 Saund. 195, f.

(f) *Page v. Eamer*, 1 B. & P. 378.

(g) See Bac. Abr. Replevin, C.

of the said distress to the said G. H. And the plaintiff saith, that at the then next county court holden in and for the —, on —, the said G. H. did appear, and then in the same court levied his plaint against the plaintiff for the taking and unjustly detaining of the said goods and chattels, and afterwards, to wit, on — last aforesaid, the plaintiff did duly appear in and before the said court, to answer the said G. H. in the plea of his said plaint; and such proceedings were thereupon had in the said plea, that afterwards, to wit, at the next county court, holden in and for the said —, on — aforesaid, the said G. H. did not duly prosecute his suit, and it was then and there duly adjudged in and by the said last-mentioned court, that the said G. H. should return to the said A. B., the said goods and chattels; and should pay to the clerk of the court the sum of £—, costs of suit. And although it was the duty of the defendant, as such sheriff as aforesaid, before his making deliverance of the said distress to the said G. H. as aforesaid, to take from the said G. H. and two responsible persons as sureties, a bond in double the value of the said goods and chattels so distrained as aforesaid, conditioned for the prosecuting the suit of replevin of the said G. H., for the taking of the said goods and chattels, with effect and without delay, and for duly returning the goods and chattels so distrained, in case a return should be awarded; nevertheless the defendant, so being such sheriff as aforesaid, not regarding

his duty in that behalf, did not, before his making deliverance of the said distress to the said G. H. as aforesaid, take from the said G. H. and two responsible persons as sureties as aforesaid, such a bond as aforesaid, conditioned as aforesaid; but on the contrary thereof, he the said defendant wrongfully and unjustly, before the replevying and delivery of the said goods and chattels as aforesaid, to wit, on — aforesaid, did take in the name of him the defendant, as such sheriff as aforesaid, of the said G. H. and two other persons, to wit, G. H. and I. K., a certain bond, conditioned as aforesaid; but the plaintiff saith, that the said G. H. and I. K., so taken as sureties as aforesaid, at the time of their becoming pledges and sureties in that behalf, were not good, able, sufficient, or responsible sureties for prosecuting the said suit with effect and without delay, or for duly returning the said cattle, goods and chattels so distrained as aforesaid in case a return thereof should be adjudged; but the said G. H. and I. K., at the time of their becoming such sureties as aforesaid, were, and each of them was and ever since hath been, and they still are, wholly insufficient for that purpose, nor have the said goods and chattels, or any of them, or any part thereof, as yet been returned to the plaintiff, nor have the said arrears of rent, or any part thereof, been as yet paid or satisfied to the plaintiff, nor hath the said judgment been yet in any way satisfied.

And the plaintiff claims £—.

It is not necessary to name the suitors in the county court, before whom the plaint was levied, &c.; or if the names be inserted, they may be rejected as surplusage, and a variance between the declaration and proof, in this respect, will be immaterial (h).

Also, it is not necessary to allege that a writ *de retorno habendo* issued, nor is it necessary that such a writ should issue, to enable the plaintiff to bring the action (i); although it is otherwise, where the distress is for damage feasant (k).

(h) *Draper v. Garratt*, 2 B. & C. 2.

(i) *Perreau v. Beavan*, 5 B. & C. 284.

(k) *Hucker v. Gordon*, 1 Cr. & M. 58.

General Issue and Evidence.

The general issue is the same as the form, *ante*, p. 242. Under this plea, the plaintiff must prove,—

1. The bond. If the plaintiff have taken an assignment of it, the bond must be produced (*l*); but it is not necessary to prove it, proof of the assignment from the sheriff being sufficient as against him (*m*). If the plaintiff have not taken an assignment of it, he must give the defendant a notice to produce it at the trial; if he produce it, it may be put in evidence, without proof (*n*); if he do not, then secondary evidence must be given of its contents (*o*).

2. The insufficiency of the sureties. This may be proved by the sureties themselves, or by any other person who can swear to the fact. Their being in debt, and upon being applied to for payment, promising to pay, but not afterwards paying, is good evidence in this respect (*p*). Even evidence of general reputation, as to their want of credit in the neighbourhood of their respective residences, will be received in proof of their insufficiency (*q*). The sheriff, however, it must be recollected, is not to be considered as warranting the sufficiency of the sureties; he is only liable for a neglect of duty, either of himself or his deputy, when sued in this action. And the duty of the sheriff, and of his replevin clerk or deputy, with reference to the sureties proposed, is, to exercise a reasonable discretion in deciding upon their sufficiency; and it is for the jury to decide whether he has used that discretion or not (*r*). He is not, indeed, bound to go out of his office to make inquiries; but if the sureties be unknown to him, he ought to require information, beyond their own statement, as to their sufficiency (*s*). And where persons of apparent respectability were brought to the replevin clerk, as sureties, by the attorney's clerk on behalf of the tenant replevying, their circumstances being unknown both to the attorney's clerk and the replevin clerk, but the latter caused the sureties to make affidavit in detail as to their sufficiency, with which he was satisfied;—in an action afterwards against the sheriff for taking insufficient sureties, it was holden that the jury might properly find that this inquiry did not excuse the sheriff (*t*). So, if it

(*l*) See *Jeffery v. Bastard*, 4 Ad. & El. 823.

(*m*) *Barnes v. Lucas et al.*, Ry. & M. 264.

(*n*) *Scott v. Waithman*, 3 Stark. 168.

(*o*) See 1 Arch. N.P. 2; Arch. Pl. & Ev. 386, 378.

(*p*) *Gwyllim v. Scholey*, 6 Esp. 100.

(*q*) *Scott v. Waithman*, 3 Stark. 168; and see *Saunders v. Darling*, Bul. N.P. 60.

(*r*) *Jeffery v. Bastard*, 4 Ad. & El. 823.

(*s*) Id.

(*t*) Id. See *Hindle v. Blades*, 5 Taunt. 225.

be shown that the sheriff or his replevin clerk had notice of facts from which the insufficiency of the sureties might fairly be implied, and, considering the information he had, that he did not act with reasonable caution,—or if he have the means of information within his power, and neglect it,—the sheriff will be liable, if the sureties, or either of them, turn out to be insufficient (*u*).

3. The damages, as in the last case (*v*).

Damages.

The defendant is liable to the extent of the penalty, but not beyond it, that being the greatest amount to which the sureties would have been liable (*w*). And even within this amount, the plaintiff cannot recover the expenses he has been put to, in suing the sureties, unless before he sued them, he gave defendant notice of his intention to do so (*x*).

SECTION III.

Action, &c. against the Sheriff for not paying Rent due to a Landlord, under an Execution against the Tenant.

In what cases.] By stat. 8 Anne, c. 14, s. 1, no goods or chattels, being in or upon any messuage, lands or tenements, leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution, on any pretence whatsoever, unless the party, at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the premises or his bailiff such sum as is due for the rent of the said premises at the time of the taking such goods and chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of this Act; and the sheriff shall thereupon proceed to levy and pay to the plaintiff, as well the money so paid for rent, as the execution money. In this case, the landlord cannot distrain for his rent upon the goods seized,

(*u*) See *Scott v. Waithman*, 3 Stark. 108.

(*v*) See *ante*, p. 243.

(*w*) *Jeffery v. Bastard*, 4 Ad. & El. 823. *Evans v. Brander*, 2 H. Bl.

550. *Paul v. Goodluck*, 2 Bing. N. C. 224, overruling *Yea v. Lethbridge*, 4 T. R. 435. *Concannon v. Lethbridge*, 2 H. Bl. 36.

(*x*) *Baker v. Garratt*, 3 Bing. 56.

whilst they are in the custody of the sheriff; and even where the sheriff sold growing crops under an execution, it was holden that the landlord could not distrain them for rent subsequently due (c).

This Act of course extends only to cases, where the goods seized in execution are at the time upon the demised premises. But it extends to all cases of demises, where the landlord is entitled to distrain; and a lessee, who underlets a part of his premises, (lodgings, for instance,) to an under-tenant, is as much within the protection of the statute, as his landlord (d). It extends also to executions, as well at the suit of defendants, as of plaintiffs (e). It has been extended also to goods taken under a writ of *Pone per vadios*, in the county palatine of Durham (f). So, upon a special *capias utlagatum*, it has been holden that the landlord is entitled to his rent; for it is a species of private execution (g). And under a sequestration from a court of Equity, the landlord has been holden to be entitled to his arrears of rent (h). This statute however extends only to cases, where the tenancy is still subsisting at the time of the seizure. And therefore where the landlord brought an ejectment against the tenant, upon the proviso in his lease for re-entry for non-payment of rent, laying his demise on the 5th December, 1815, and obtained judgment on the 1st July, 1816; on the same day a writ of *fi. fa.* against the tenant was lodged with the sheriff at the suit of a third party, under which he seized on the day following; after which a writ of possession in the ejectment was delivered to him: it was holden that the sheriff could not allow the landlord a year's rent under the *fi. fa.*; for by the ejectment it appeared that the tenancy was no longer subsisting, but that the execution debtor had been a trespasser since the 5th December in the preceding year (i).

The statute says that the party, at whose suit the execution is sued out, shall pay the rent, and that the sheriff shall repay him out of the proceeds of the levy. But as it is the sheriff who removes the goods, he is in all cases deemed the party liable to the landlord, who may proceed against him for his rent, either by application to the court, or by special action on the case (k); an action for money had and received will

(c) *Wharton et al. v. Naylor et al.*, 17 Law J. 278, qb.

(d) See *Thurgood v. Richardson et al.*, 7 Bing. 428.

(e) *Henchett v. Kimpson*, 2 Wils. 140.

(f) 11 G. 4, & 1 W. 4, c. 11, s. 1.

(g) *St. John's College v. Murrett*, 7 T. R. 259.

(h) *Dixon v. Smith*, 1 Swanst. 457.

(i) *Hodgson et al. v. Gascoigne*, 5 B. & A. 88.

(k) *Green et al. v. Austin*, 3 Camp. 260. *Palgrave v. Windham*, 1 Str. 212. *Riseley v. Ryle*, 11 Mees. & W. 16. See *Duck v. Braddyl*, 13 Price, 455. *Calvert v. Jolliffe*, 2 B. & Ad. 418. *Reed v. Thoyts*, 6 Mees. & W. 412.

not lie (*l*). Nor can either action or application be sustained, unless the goods have been removed from the premises (*m*). Where the sheriff, after notice, paid the rent, but the goods being claimed by another party, and an interpleader order obtained, under which the sheriff was directed to sell the goods and pay the money into court, an interpleader suit was brought, and it was decided that the goods seized were the property of the claimant and not of the execution debtor :—it was holden that the sheriff could not deduct the money he had paid to the landlord, but that the claimant was entitled to the whole amount of the sale (*n*).

By and against whom.] It is the immediate landlord who is protected by the statute; and therefore if A. let to B., and B. underlet to C., and an execution be levied on the goods of C.,—the application or action against the sheriff shall be by B. only, and not by A. (*o*). Or if the immediate landlord be dead, the action may be brought by his executor or administrator (*p*). But a trustee, to whom an outstanding term was assigned in trust for a mortgagee, (the fee being conveyed to the mortgagee by the mortgage deed,) has been holden entitled to bring this action, where the sheriff sold and removed the goods of the tenant, occupying the mortgaged premises under an agreement from the mortgagor (*q*). And where in an agreement for sale, it was stipulated that until the assignment should be made, the purchaser should pay to the vendor 100*l.* per annum, from the time of taking possession, until the completion of the purchase: it was holden that this constituted the relation of landlord and tenant, and that the vendor was entitled to his rent under the statute, on an execution against the purchaser (*r*). And the same, in all other cases where the landlord may distrain for rent, as of common right (*s*).

The action or application is always against the sheriff or officer to whom the writ of execution was directed.

Form of Notice.

To the Sheriff of —, and to E. F.,
his Officer.

Take notice that there is due to
[me] from J. N. of —, the sum
of £—, for [one year's] rent of
the house [No. —] occupied by

him as my tenant, and due at
[Michaelmas-day] last past; and I
hereby require you to pay the same
to me, before the goods seized by
you in execution upon the said pre-
mises shall be removed. Dated, &c.

(*l*) *Green et al. v. Austin*, supra.
(*m*) *White et al. v. Binstead et al.*, 22 Law J. 115, cp.
(*n*) *Id.*
(*o*) *Ex. p. Bennett*, 2 Str. 737.
(*p*) *Palgrave v. Windham*, 1 Str. 212.

(*q*) *Colyer v. Spicer*, 2 Brod. & B. 67.
(*r*) *Saunders v. Musgrave*, 6 B. & C. 524.
(*s*) See ante, p. 111.

It is prudent although not actually necessary, to give the sheriff a notice in this form, or to this effect, in order to facilitate the proof of notice at the trial, should it be necessary. Duplicates of it should be made, signed by the landlord, or his agent duly authorized for the purpose; and one of them should be served upon the sheriff, by leaving it for him at the office of the under-sheriff; the other upon the sheriff's officer who has seized the goods, personally if possible, or if not, by leaving it for him at his house or place of business. But, although the sheriff will not be liable to the landlord, unless he have notice of the landlord's claim (*t*), yet if the sheriff or his officer have knowledge of it in any other way, from the landlord or from any other person, it will be sufficient (*u*); and where it is intended to proceed by way of motion, it will be sufficient if such claim came to the knowledge of the sheriff or his officer, at any time whilst the goods remained in his hands, although after the removal of them from the demised premises (*v*).

Application to the court.] The application to the court, that the sheriff shall pay the rent to the landlord, is founded on an affidavit stating the tenancy, the amount of the rent claimed, and when due, the seizure of the goods in execution by the sheriff, notice to the sheriff or his officer of the claim, the removal of the goods, and that the rent has not been paid. Upon this a rule *nisi* is granted; and if the sheriff do not show a sufficient cause against it, it will be made absolute, and may afterwards be enforced by attachment.

Action.] It has been already mentioned, that in all cases within the statute, if the sheriff do not pay over to the landlord the amount of the rent claimed by him, before he removes the goods from the demised premises, the landlord may proceed against him either by application to the court, or by action on the case (*w*).

The following are the pleadings and evidence in the action.

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—. Berks, to wit: A. B., the plaintiff in this suit, by E. F., his attorney,

sues C. D., the defendant in this suit: For that one G. H., before and at the time of the committing of the grievances hereinafter mentioned.

(*t*) *Smith v. Russell*, 3 Taunt. 400.
(*u*) *Andrews v. Dixon*, 3 B. & A. 645.
Colyer v. Speer, 2 Brod. & B. 67.

(*v*) *Arnitt v. Garnett*, 3 B. & A. 440. See *Waring v. Denberry*, 1 Str. 97.
(*w*) *Ante*, p. 247.

was tenant to the plaintiff of a certain messuage, at and under the yearly rent of £—, payable quarterly, by equal quarterly payments, on —; and that heretofore, and before the time of the taking of certain goods and chattels upon the said premises, by virtue and under the pretence of a writ of execution, as hereinafter mentioned, to wit, on —, a large sum of money, to wit, the sum of £— of rent aforesaid, for [one year] of the said tenancy, became and was due and payable, and continually from thence hitherto has been, and still is, in arrear and unpaid: And that afterwards, and whilst the said rent was so in arrear and unpaid as aforesaid, and whilst the said G. H. so occupied the said premises as tenant thereof to the plaintiff as aforesaid, to wit, on —, the defendant, then being sheriff of the county of Berks, by virtue and under pretence of a certain writ of execution of our Lady the Queen, called a *fiery facias*, against the said G. H., at the suit of one I. K., sued forth and prosecuted out of the court of our Lady the Queen, before the Queen herself, and directed to the sheriff of the said county of Berks, seized and took the goods and chattels of the said G. H., then being in the [messuage] aforesaid, with the appurtenances, so then being in the tenure and occupation of the said G. H., as tenant thereof as aforesaid, to a large amount, to wit, beyond the amount of the said arrears of rent so due and owing from the said

G. H. to the plaintiff, that is to say, to the amount of £—: And the plaintiff saith, that after the said seizing and taking of the said goods and chattels, so being in the said [messuage] and premises, as aforesaid, and before the removal of the same under pretence of the said writ, to wit, on —, the plaintiff gave notice to the defendant, so being then the sheriff of the said county of Berks, of the aforesaid rent so being due and in arrear to the plaintiff from the said G. H., and then requested the defendant, that he the plaintiff might be paid his rent so due, in arrear and unpaid as aforesaid, before the said goods and chattels or any part thereof should be removed from or out of the said [messuage] and premises: Yet the defendant, under colour and pretence of the said writ, to wit, on —, wrongfully, injuriously and deceitfully removed and carried away the said goods and chattels so seized and taken as aforesaid, from and out of the said [messuage] and premises, without paying or satisfying the plaintiff the said rent, so due and owing and in arrear to him, as aforesaid, or any part thereof; contrary to the form of the statute in such case made and provided: And the plaintiff in fact further saith that he hath not at any time since been paid or satisfied the said rent, or any part thereof, but the same and every part thereof is still due, in arrear and unpaid from the said G. H., to the plaintiff: And the plaintiff claims £—.

It is not necessary in this declaration to state the particulars of the demise; but if they be stated, and there be any variance between the statement and the proof, it will be fatal (x), unless the judge at the trial allow the record to be amended. Nor is it necessary to show that the goods were such as were liable to a distress (y). ✓

Care must be taken not to omit stating the notice to the sheriff. It is not necessary to state that any notice was given to the execution creditor (z). But where the declaration averred, generally, that the defendant, "well knowing the premises," removed the goods, without paying the rent, this

(x) *Beaston v. Wright*, 2 Doug. 655.

(y) *Riseley v. Ryle*, 11 Mees. & W. 16.

(z) *Id.*

was holden to be sufficient after verdict ; and the court refused to arrest the judgment (*d*).

Care must be taken, also, to show plainly and explicitly, upon the face of the declaration, that the tenancy was subsisting at the time the sheriff seized under the writ of execution ; otherwise the declaration will be bad upon demurrer. Even where it is stated that the execution debtor heretofore, to wit, on the 25th December, 1841, and for a long space of time then last past, to wit, for the space of five years, occupied a certain brewery and premises, as tenant thereof to the plaintiff, at a certain rent, &c., and that 250*l.* for one year's rent of the same ending on the day and year aforesaid was due and in arrear, and that the defendant, being sheriff of the county of Chester, by virtue of a writ of *fi. fa.* to him directed, "took certain goods and chattels then lying and being in and upon the said brewery, dwelling-house and appurtenances, so in the tenure and occupation of" the debtor ; and it was argued that these latter words "so in the tenure and occupation," must have reference to the time of the seizure, and that therefore it sufficiently appeared that the tenancy was then subsisting : the court however were of a different opinion, but gave the plaintiff leave to amend (*e*).

General Issue and Evidence.

The general issue is the same as the form, *ante*, p. 242.

This plea puts in issue merely the breach of duty complained of (*f*) ; that is to say, the not paying the plaintiff the rent due to him, before the removal of the goods. If the defendant wish to put the plaintiff to the proof of any matter stated in the inducement of the declaration, he must traverse it. All therefore that the plaintiff will have to prove, under this plea, is—

1. The removal of the goods by the defendant or his officer ; and a removal of any of the goods, under this execution, will render the sheriff liable to this action, although he leave sufficient goods upon the premises to satisfy the rent, if the landlord will distrain for it (*g*). And the sheriff selling the goods by bill of sale, has been holden a removal, within the meaning of the Act (*h*). Also, as the sheriff becomes liable, immediately upon the act of removal, he cannot get rid of that liability, even by returning the goods, and placing them on the

(*d*) *Lane v. Crockett*, 7 Price, 566.
S. P. Per Powys, J. in *Palgrave v. Windham*, 1 Str. 214.

(*e*) *Riseley v. Ryle*, 10 Mees. & W. 101.

(*f*) Rule Pl. H. 1853, s. 16.

(*g*) *Colyer v. Speer*, 2 Brod. & B. 67.

(*h*) *Barnes*, 211. See *Wharton et al. v. Naylor et al.*, 17 Law J. 278, qb.

demised premises, as they were before (i). As to the ownership of the goods, it matters not whether they are the goods of the tenant, or the goods of a stranger (k), provided they were goods upon which the landlord might have distrained.

2. That the defendant has not paid the rent.

3. The damages. And for this purpose it will seemingly be necessary to show what rent was due, even although the statement of that in the inducement be not traversed. But it is sufficient to prove an occupation by the tenant for the time claimed; and it lies upon the defendant to show a payment of the rent for any part of that time (l).

General Traverses.

And for a further plea in this behalf, the defendant says that the said E. F. did not [hold, use, occupy or enjoy the messuage or the appurtenances in the said declaration

above-mentioned, as tenant thereof to the plaintiff], in manner and form as the plaintiff has in that behalf alleged.

In like manner, the other parts of the inducement may be traversed.

Evidence.

1. If the tenancy be traversed, the plaintiff must prove it, in the same manner as in an action for use and occupation (m); or in debt or covenant for rent (n). And it must appear that the premises were holden at a rent certain, for which the plaintiff might by law distrain (o).

2. If the fact of the rent being due, be traversed, the plaintiff must prove it; and he may call the tenant himself as a witness for that purpose (p). However it will be sufficient for him in the first instance, to prove the occupation of the tenant for the time the rent is claimed; and it will then be for the defendant to prove payment of the whole or any part of it (q). So, if by the terms of the demise, the landlord be entitled to fore-hand rent, the sheriff will be liable for it in this action (r). But he is liable only to one year's rent, although there be several executions (s); and only for the rent due at the time

(i) *Lane v. Crockett*, 7 Price, 506.

(k) *Forster v. Cookson*, 1 Q. B. 419.

(l) *Harrison v. Barry*, 7 Price, 600.

(m) See *ante*, p. 150.

(n) See *ante*, pp. 150, 154.

(o) *Riseley v. Ryle*, 11 Mees. & W. 16. And see *ante*, p. 112.

(p) See *Thurgood v. Richardson*, 7 Bing. 428.

(q) *Harrison v. Barry*, 7 Price, 600.

(r) *Id.*

(s) *Dod v. Saxby*, 2 Str. 1024.

of the seizure, and not for rent which accrued afterwards and whilst the sheriff remained in possession (*t*). But the landlord is entitled to a full year's rent, if that be due at the time of the seizure, although he may have been used to remit some portion of it upon previous occasions (*u*).

3. If the defendant traverse the taking of the goods by virtue or under pretence of the *feri facias*, the plaintiff will have to prove it. The writ, if returned, may be proved by an office copy, and the return will be good evidence of the taking. But if the writ be not returned, then the plaintiff must give the defendant notice to produce it at the trial; and if it be not produced, the warrant will be good secondary evidence of it, or the officer who executed it may give such evidence. To connect the officer with the sheriff, also, the warrant must be produced and proved, and evidence given, either by the officer or some other person, that the seizure was by him. Where the seizure was not traversed, it was holden to be unnecessary to produce the warrant in order to prove the connection between the defendant and the officer seizing, for that was sufficiently confessed (*v*). And it is little matter whether the goods seized and removed were the property of the tenant or a stranger (*w*); for in either case, the landlord might have distrained and is deprived of the distress by the removal. Care must be taken that there is no variance between the writ set out, and the writ or copy produced in evidence. Where the writ set out was stated to be returnable "before the King himself," and a writ, issued from the Common Pleas, was given in evidence, the court held the variance fatal (*x*).

Special Pleas.

The defendant may plead specially, any defence which confesses the cause of action. The sheriff it seems may show, by special plea, that the tenant was a bankrupt at the time of the seizure, and that the goods on the premises were vested in the assignees or provisional assignee, and that he was afterwards obliged to pay over the whole produce of the sale to the assignees; for being in the custody of the law, the landlord could not distrain upon them, but he must apply for this year's rent under the provision upon that subject in the statute of bankrupts (*y*).

(*t*) *Hoshins v. Knight*, 1 M. & S. 245. *Hodgson v. Gascoigne*, 5 B. & A. 88. *Gwillim v. Barker*, 1 Price, 274.

(*u*) *Williams v. Lercsey*, 8 Bing. 28.

(*v*) *Reed v. Thoyts*, 6 Mees. & W. 412.

(*w*) *Forster v. Cookson*, 1 Q. B. 419.

(*x*) *Sheldon v. Whitaker*, 4 B. & C. 657.

(*y*) See *Lee v. Lopes*, 15 East, 230.

If the execution be at the suit of the landlord himself, the case is not within the meaning of the statute (*z*); and if this appear upon the face of the declaration, the defendant may demur; if it do not, he may plead the matter specially in bar.

So, where, upon the goods of a tenant being taken in execution, an agent of the landlord consented to the goods being sold, upon receiving from the sheriff's officer an undertaking to pay him the year's rent: it was holden that the landlord, under these circumstances, could not afterwards maintain this action against the sheriff, although the officer did not pay the rent, and although the undertaking was void by the Statute of Frauds, as not showing a consideration on the face of it (*a*). And the same matter might now be made the subject of a special plea.

Verdict.

The plaintiff, if he have a verdict, is entitled to damages, to the amount of the rent proved to be in arrear at the time of the seizure, not exceeding a year's rent. It is the duty of the sheriff, in the first place, to levy the rent, and then the amount indorsed upon the writ; and upon the removal of the goods, he is liable to the landlord for the full amount of the rent, although he leave upon the premises goods sufficient to satisfy a part, or even the whole, of the rent claimed (*b*). Therefore, in practice, if the goods be not sufficient to realize more than the amount of the year's rent, the sheriff usually withdraws from the possession; for if he remove the goods, and they sell for less than the rent, the court, in an action against the sheriff on this statute, will not stay the proceedings, upon his paying over, or paying into court, the proceeds of the sale (*c*).

CHAPTER IV.

Action against Sureties or Pledges in Replevin.

In what cases.] We have seen, *ante*, p. 240, 241, that in every replevin of a distress for rent, the sheriff or other officer replevying, before he make deliverance of the distress, shall, in his own name, take from the plaintiff and two responsible

(*z*) *Taylor v. Lanyon*, 6 Bing. 530.

(*a*) *Rothery v. Wood*, 3 Camp. 24.

(*b*) *Colyer v. Speer*, 2 Brod. & B. 67.

(*c*) *Foster v. Hilton*, 1 Dowl. 35. *Calvert v. Jolliffe*, 2 B. & Ad. 418.

persons as sureties, a bond in double the value of the goods distrained, and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods distrained in case a return shall be awarded (*a*).

There are three things, therefore, which the tenant is bound by his bond to do:—to prosecute his replevin suit without delay,—to prosecute it with effect,—and to make a return, if a return shall be awarded; and a breach of the bond in any of these respects, will subject the tenant and his sureties to an action upon it. As to the time of commencing the replevin suit, the condition of the bond requires the tenant to appear at the next county court, to be holden at a time and place therein mentioned, and then and there to prosecute his suit with effect and without delay. And if therefore he do not appear at the next county court, and there levy his plaint, the bond may immediately be put in suit (*b*). So, allowing two years to elapse, without proceeding, is a breach of the condition of the bond, to prosecute the suit without delay; and the obligee may recover for such breach, although judgment of non. pros. have not been signed in the county court (*c*).

The condition to prosecute the suit “with effect,” means, to prosecute it to a successful termination (*d*); and therefore, where the plaint is removed into the court above, and the plaintiff is non-pros’d for want of a plea in bar, the defendant may immediately put the bond in suit, without suing out or executing a writ of inquiry under stat. 17 C. 2, c. 7, or suing out a writ *de retorno habendo* (*e*). So, if the plaintiff fail at the trial, the defendant may put the bond in suit, although he have elected to proceed upon stat. 17 C. 2, c. 7, and have had his damages assessed; for he is not confined to his execution under that statute (*f*).

Bond.] The following is the form of the replevin bond:—

Know all men by these presents, that we, G. H., of —, A. B. of —, and C. D., of —, are jointly and severally held and firmly bound to T. W. esquire, sheriff of the county of —, in the sum of £— of lawful money of the United Kingdom of Great Britain and Ireland, to be paid to the said sheriff or his certain attorney, executors, administrators,

or assigns; for which payment well and truly to be made, we bind ourselves and each and every of us in the whole, our and each and every of our heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated, &c.

The condition of this obligation is such, that if the above bounden G. H. do appear at the next county

(*a*) 11 G. 2, c. 19, s. 23.

(*b*) See *Warton v. Blacknell*, 13 Law J. 112, ex. *Dias v. Freeman*, 5 T. R. 195.

(*c*) *Axford v. Perrett*, 4 Bing. 586.

(*d*) *Perreau v. Beavan*, 5 B. &

C. 284. *Jackson v. Hanson*, 8 Mees. & W. 477.

(*e*) *Waterman v. Yea*, 2 Wils. 41. *Turnor v. Turner*, 2 Brod. & B. 107.

(*f*) *Perreau v. Beavan*, 5 B. & C. 284.

court, to be holden for the county of —, at — in the said county, on — next, and prosecute his suit with effect and without delay against J. S., for the taking and unjustly detaining of his cattle, goods and chattels, to wit, [*here enumerate the goods distrained,*] and to make return of the said cattle, goods and chattels, if a return thereof shall be adjudged; and if the said G. H. shall well and truly keep harmless and indemnified the

said T. W., sheriff as aforesaid, his under-sheriff, deputy and bailiffs, touching and concerning the replevyng and delivery of the said goods and chattels, and also from and against all actions, suits, damages, losses, costs and charges that may arise or happen unto the said T. W. in consequence or by means thereof: that then this obligation shall be void and of none effect, or else to be and remain in full force and virtue. Sealed, &c.

In the common forms of a replevin bond, the words “then and there” are introduced before the words “prosecute his suit with effect,” which seemingly binds the tenant to prosecute his suit with effect at the next county court, which may be impossible, and to prosecute it with effect in the county court, which may be impossible also, as it may be removed into a superior court, when the proceedings in the county court will of course be at an end. In *Jackson v. Hanson et al.* 8 *Mees. & W.* 477, Parke, B., observed upon this, and said, that the words “then and there” ought to be omitted, to make the condition of the bond conformable with the statute. On this account, and because these words are often exceedingly embarrassing in pleading, I have omitted them in the above form. But although by the condition of the ordinary form of a replevin bond, the tenant is bound to appear at the next county court, and “then and there” prosecute his suit with effect and without delay, yet if the plaint be removed into a superior court, and the tenant there fail to prosecute the suit with effect and without delay, he will be equally guilty of a breach of the bond, and he and his sureties may be sued upon it (g).

Where a replevin bond was made to one of the sheriffs of London, and assigned by him to the landlord, it was holden on demurrer that as nothing appeared to show that one sheriff might not grant replevin, the bond and assignment were good (h).

Also a bond conditioned to prosecute the suit with effect, (omitting the words “and without delay,”) and to indemnify the sheriff, has been holden good, and may be assigned (i).

Assignment.] By stat. 11 G. 2. c. 19, s. 23, after directing the sheriff, or other officer granting replevins, to take a replevin bond, it is enacted that “such sheriff or other officer as afore-

(g) *Grillim v. Holbrook*, 1 B. & P. 410.

(h) *Thompson v. Farden*, 1 Man. & Gr. 535.

(i) *Dunbar v. Dunn*, 10 Price, 54.

said taking any such bond, shall, at the request and costs of the avowant or person making cognizance, assign such a bond to the avowant or person aforesaid, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereupon; and if the bond so taken and assigned be forfeited, the avowant or person making cognizance may bring an action and recover thereupon in his own name."

If the replevin suit be against the landlord alone, who avows the taking, he of course is alone entitled to the assignment. So, if the replevin suit be against the bailiff alone, who makes cognizance, he alone is entitled to it. But if the replevin suit be against both, the bond may be assigned to both, and they may jointly sue upon it (*k*); or it may be assigned to the avowant alone, and he may bring an action upon it, without joining the person making cognizance (*l*). The assignment, it should seem, may be taken at any time, in the same manner as formerly in the case of a bail bond; but no action can be brought upon it, until after the tenant or party replevying have been guilty of some breach of the condition (*m*). The following is the usual form of the assignment:—

Know all men by these presents, that I, T. W., esquire, sheriff of the county of —, have, at the request, of the within named J. S., the avowant [*or person making cognizance*] in this cause, assigned over this replevin bond unto him the said J. S.,

pursuant to the statute in such case made and provided. In witness whereof I have hereunto set my hand and seal of office, this — day of —, 18—.

Sealed, &c.

Declaration.] The following may be the form of the declaration:—

In the Queen's Bench.

The — day of —, A.D. 18—.

Middlesex, to wit: J. S., the plaintiff in this suit, and assignee of T. W. esquire, sheriff of the county of —, according to the form of the statute in such case made and provided, by E. F., his attorney, sues C. D., the defendant in this suit: For that heretofore, to wit, on —, the said J. S. distrained the goods and chattels of one G. H., hereinafter mentioned,

for a certain sum of money then due to the said J. S. for rent; And the said goods and chattels being so distrained, the said G. H. afterwards, and within the space of five days then next ensuing, to wit, on — aforesaid, made his plaint to the said T. W., then being sheriff of the county of —, out of the county court of the said sheriff, of the taking and unjustly detaining of the said goods and chattels of the said G. H. by the said J. S.,

(*k*) *Phillips et al. v. Price*, 3 M. & S. 180.

(*l*) *Archer v. Dudley*, 1 B. & P. 381, n.

(*m*) See *Seal v. Phillips*, 3 Price, 17. *Anon.* 5 Taunt. 776.

and then prayed the said sheriff that the said goods and chattels might be forthwith replevied by the said sheriff, and delivered to the said G. H.; And thereupon the said T. W., so being sheriff of the said county of —, did take from the said G. H., and from the said defendant, and one A. B., as two responsible sureties, a bond in double the value of the said goods and chattels, so distrained as aforesaid, (the value of the said goods and chattels having been on that occasion first ascertained by the oath of a credible witness, duly sworn, according to the form of the statute in such case made and provided); And the said A. B. and the said defendant and C. D. on the said —, by their certain writing obligatory, sealed with their respective seals, the date whereof is the day and year last aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the said T. W., so being sheriff of the said county of —, in the sum of £ —, to be paid to the said sheriff or his assigns, when he the said A. B. and the said defendant and C. D. should be thereunto afterwards requested, with a condition thereunder written, that if the said G. H. should appear at the then next county court to be holden for the county of —, at — in the said county, on — then next, and should prosecute his suit with effect and without delay, against the said J. S., for the taking and unjustly detaining of certain cattle, goods and chattels in the said condition mentioned, and should make return thereof, if a return should be adjudged, and should well and truly keep harmless and indemnified the said sheriff of —, his undersheriff, deputy, and bailiffs, touching and concerning the replevying and delivery of the said cattle, goods and chattels, and also from and against all actions, suits, damages, losses, costs and charges that might arise or happen unto him the said T. W., in consequence or by means thereof, then the said obligation was to be void and of none effect, otherwise to be and remain in full force and virtue. And thereupon the said sheriff afterwards, to wit, on the day and year last aforesaid, at the prayer of the said G. H., re-

plevied and made deliverance of the said goods and chattels to the said G. H., according to the duty of his said office; And afterwards, to wit, at the then next county court for —, holden at —, on — the said G. H. did appear, and then in the same court, without the writ of our said lady the Queen, levied his plaint against the said J. S., for the taking and unjustly detaining of the said cattle, goods and chattels of the said G. H., and then found pledges as well for prosecuting his said plaint, as for returning the said goods and chattels, if return thereof should be adjudged, to wit, the said defendant and the said A. B.; which said plaint afterwards, to wit, on —, was duly removed at the instance of the said J. S., from and out of the said county court, into the court of our said lady the Queen before the Queen herself, by virtue of her said Majesty's writ of *certiorari*. And thereupon the said G. H. afterwards, to wit, on —, in the court of our said lady the Queen, before the Queen herself, by —, his attorney, declared against the said J. S. in the said plea of taking and unjustly detaining his goods and chattels, and by the said declaration he the said G. H., by the said —, his attorney, complained that the said J. S. on — aforesaid, in a certain dwelling-house in the parish of —, in the county of —, took the goods and chattels following, to wit, [*here recite the goods as in the declaration,*] and them unjustly detained against sureties and pledges, &c.; And afterwards, to wit, on —, in the said court of our said lady the Queen, before the Queen herself, the said J. S. well avowed the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which, &c., and justly, &c., because he said that one N. P. for a long space of time, to wit, for the space of — next before, and ending on —, and from thence until and at the said time when, &c., held and enjoyed the said messuage or dwelling-house, in which, &c., with the appurtenances as tenant thereof, to the said J. S. by virtue of a certain demise thereof to the said N. P., theretofore made at and under the yearly rent of

£ —, payable on, &c., in every year, and because £ —, part of the said sum of £ — of the rent aforesaid, for the space of — ending on, &c., as aforesaid, and from thence until and at the said time, when, &c., was due and in arrear from the said N. P. to the said J. S., the said J. S. well avowed the taking of the said goods and chattels in the said declaration mentioned in the said message or dwelling-house, and justly, &c., as for and in the name of a distress for the said sum of £ —, so due and in arrear as aforesaid, and which said sum of £ — so due and in arrear to the said J. S. then still remained wholly due and unpaid. And such proceedings were thereupon had in the said plea, in the said court of our said lady the Queen, before the Queen herself aforesaid, that afterwards, to wit, on —, in the said court of our said lady the Queen, before the Queen herself, it was considered and adjudged in and by the same court, that [the said G. H. should take nothing by his said plaint, but that he and his pledges to prosecute should be in mercy, &c., and that the said J. S. should have a return of the said goods and chattels; as by the record and proceedings thereof now remaining in the said court of our said lady the Queen, before the

Queen herself, more fully appears]. And the said J. S. in fact further saith, that the said G. H. did not make a return of the said goods and chattels, or any part thereof, according to the form and effect of the said writing obligatory, but hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do. Whereby the said writing obligatory became forfeited to the said T. W., so being sheriff of the said county of — as aforesaid. And the same being so forfeited as aforesaid, the said sheriff afterwards, to wit, on —, at the request and costs of the said J. S., by an indorsement on the said writing obligatory, duly made and attested, in the presence of and attested by two credible witnesses, and sealed with the seal of office of sheriff of the said county of —, assigned the said writing obligatory to him the said J. S., according to the form of the statute in such case made and provided; By means whereof, and by force of the statute in such case made and provided, an action hath accrued to the plaintiff, as assignee of the said T. W., so being sheriff of the said county of —, as aforesaid, to demand and have of and from the said defendant the said sum of £ —. And the plaintiff claims £ —.

The action may be brought in one of the superior courts, although the replevin suit have never been removed out of the county court (n). And if it have been removed, the action on the bond is not necessarily to be brought in that court into which it has been removed, but the plaintiff may bring it in any other of the superior courts at his option (o).

In stating the distress, it is not necessary to enumerate the goods distrained; and if it state that the sheriff took the bond in double the value, conditioned for prosecuting, &c., and for making return of "the goods in the condition mentioned, and thereupon the sheriff replevied the same," this shows sufficiently that the bond was conditioned for the return of the goods distrained (p). So, where the declaration, at the suit

(n) *Dias v. Freeman*, 5 T. R. 195.

(o) *Wilson v. Hartley*, 7 Dowl. 461.

(p) *Phillips et al. v. Price*, 3 M. & S. 180.

of both the avowant and party making cognizance, stated that they made the distress jointly for rent due to the former: this was holden to mean that they distrained in the respective characters of landlord and agent (q).

Where the declaration stated that the bond had been taken by one of the sheriffs of London, and by him assigned to the plaintiff, the court held that as nothing appeared to show that one sheriff might not grant replevin, the bond and assignment were good (r).

In alleging the breach of the condition, it is not objectionable to say, that the tenant did not prosecute his suit with effect, and did not make a return,—it is not bad for duplicity,—and the defendant must answer both breaches; but if he made a return, it is immaterial whether he prosecuted his suit with effect or not; and if he prosecuted his suit with effect, he need not make a return (s). A statement of a breach of any part of the condition, however, as by averring that he did not prosecute with effect, or without delay, or that he did not make a return, or did not indemnify the sheriff, will singly be sufficient to support the action (t). But where the breach was, that although the distrainee did appear in the county court and levy his plaint, which plaint, at his instance, was afterwards removed into the court of Common Pleas by writ of *re. fa. lo.*, yet that the distrainee did not appear in the court of Common Pleas at the return of the *re. fa. lo.*, and did not then and there, or at any other time, prosecute the suit with effect, although a reasonable time had elapsed; to which there was a plea that, after the removal of the suit, and before the return of the *re. fa. lo.*, the distrainee died, whereby the suit had abated; and to this the plaintiff replied, that the distrainee in his lifetime, whilst the plaint was proceeding in the county court, sued out the *re. fa. lo.*, and thereby delayed the suit; the court held that the record altogether showed no breach of the condition, and two of the judges held that the replication was a departure (u).

The bond being joint and several, the sheriff or assignee may bring one action against all, or may sue any one of the parties separately (v). But where he brought separate actions against the principal and each of the sureties, the court of Common Pleas made a rule, that the proceedings in all the actions should be stayed, on payment of the rent and costs; and that if such payment should not be made, then that the first of the

(q) *Phillips et al. v. Price*, 3 M. & S. 180.

(r) *Thompson v. Farden*, 1 Man. & Gr. 535.

(s) *Phillips et al. v. Price*, 3 M. & S. 180.

(t) *Dunbar v. Dunn*, 10 Price, 54.

(u) *Morris v. Matthews et al* 2 Q. B. 293.

(v) *Wilson v. Hobday*, 4 M. & S. 120.

actions should be proceeded with, and the defendants in the other two actions be bound by the event of the first action (*b*).

General issue.] The general issue is *non est factum*; under which the only question will be, whether the defendant executed the bond; and this the plaintiff must prove. The defendant, on the other hand, may take advantage of any variance between the bond and the statement of it in the declaration (*c*). But this is not of much use, as the judge has the power in such a case to order the record to be amended, to make it conformable with the bond.

General traverses.] The defendant may, it seems, traverse the distress, the application to the sheriff to replevy, the replevin, the removal of the plaint, the avowry in the court above, the judgment, and the assignment of the bond. But where these things can be proved, it is not usual in practice to traverse them. It is very usual, however, to traverse the breach or breaches of the bond assigned in the declaration; indeed, this is the usual defence set up to the action. If the breach be, that the tenant did not prosecute his suit with effect, and this be traversed, the plaintiff will have to prove that the tenant prosecuted the suit to a termination, but without success (*d*). If the breach be, that the defendant did not prosecute his suit without delay, and it be traversed, proof that the defendant took no proceedings for a long and unreasonable time (two years), will support the breach, although no judgment of *non-pros.* was signed (*e*). Nor is it necessary in any case to show that a judgment was actually given against the plaintiff in the replevin suit; if it be proved that he did not use due diligence, in prosecuting the suit, it will be sufficient proof of the breach that he did not prosecute it without delay (*f*). But it will be no breach if the plaintiff in replevin were prevented from proceeding in the suit, by reason of the defendant not appearing (*g*), or the like.

Special pleadings.] The defendant may plead that he appeared in the replevin suit, and was ready to proceed in it, but that the plaintiff prevented him by not appearing (*h*); or that he the defendant appeared at the next county court, and there commenced the replevin suit, and that the same is still pend-

(*b*) *Bartlett v. Bartlett* 4 Man. & Gr. 269.

(*c*) See *Glover v. Coles*, 1 Bing. 6.

(*d*) See *Perreau v. Bevan*, 5 B. & C. 284. *Jackson v. Hanson*, 8 Mees. & W. 477. *Waterman v. Yea*, 2 Wils. 41. *Turnor v. Turner*, 2 Brod. & B. 107.

(*e*) *Axford v. Perrett*, 4 Bing. 586.

(*f*) *Per Cur.* in *Harrison et al. v. Wardle et al.*, 5 B. & Ad. 154, 146.

(*g*) *Id.* *Seal v. Phillips*, 3 Price, 17.

(*h*) *Harrison et al. v. Wardle et al.*, *supra*; and see *Seal v. Phillips*, 3 Price, 17.

ing (i) ; to which the plaintiff may reply, that the suit is not pending, showing how it was determined (k), or may reply, showing that the distrainee did not use due diligence in prosecuting the suit, although the same be not determined (l). And where the defendant pleaded that upon the replevin suit being removed by *re. fa. lo.*, he appeared in the court above, but the plaintiff not appearing, he could not proceed in the suit; to which the plaintiff replied, that he was not summoned to appear; and the defendant rejoined, by way of estoppel, that the sheriff had returned to the *re. fa. lo.*, that he had prefixed a day to the parties to appear and proceed in the plaint: the court held that although this was no estoppel, binding on the defendant, yet as the *re. fa. lo.*, directed the sheriff to summon the plaintiff, and the defendant was not responsible for the default of the sheriff, he could not be deemed guilty of delay in the suit, as the plaintiff had not in fact appeared (m). But it is no plea to state that the distrainor appeared in the county court, and that the suit is still pending, without showing that the distrainee also appeared, and was prosecuting the suit (n).

That the judgment against the tenant in the replevin suit was obtained by the plaintiff by fraud, and in collusion with the tenant, would be a good plea in an action against the sureties in a replevin bond; but then it must be pleaded and proved that this was done for the purpose of defrauding the sureties (o).

That the plaintiff and defendant in the replevin suit referred that suit to an arbitrator, and, without the consent or privity of the sureties to the replevin bond, agreed that the bond should stand as a security for the performance of the award,—however this may be a ground for an application to the equitable jurisdiction of the court (p), it is not a good plea to an action on the replevin bond (q).

Also, it is no plea, to say that the bond, although purporting to be by two sureties, was executed by one only, namely, the defendant (r).

And where the defendant pleaded that the bond was obtained from him by T. H., in the name of the sheriff, under the colour and pretence that he was deputy to the sheriff for taking replevins, whereas he had no such deputation or authority, and the plea concluded with a special traverse of the bond having

(i) *Brackenbury v. Pell*, 12 East, 585.

(k) *Id. Hallett v. Mounstephen*, 2 D. & Ry. 343.

(l) *Harrison et al. v. Wardle et al.*, 5 B. & Ad. 144, 146.

(m) *Id.*

(n) *Rider v. Edwards*, 3 Man. & Gr. 202.

(o) *Moore v. Bowmaker*, 7 Taunt. 97.

(p) *See Archer v. Hale*, 4 Bing. 464.

(q) *Aldridge v. Harper et al.*, 10 Bing. 118. *Moore v. Bowmaker*, supra. 5 B. & Ad. 154, 146.

(r) *Austin v. Howard*, 7 Taunt. 28, 327.

been taken by the sheriff: the court held that the only matter in issue was, whether the sheriff took the bond; and that evidence of T. H.'s acting as deputy of the sheriff, was sufficient *primâ facie* evidence of his appointment, and cast upon the defendant the onus of proving that T. H. was not appointed (*r*).

Verdict.] The plaintiff is entitled to recover the amount of his rent, if that be less than the value of the goods distrained, or the value of the goods, if that be less than the rent, and the costs in the replevin suit (*s*), to the extent of the penalty of the replevin bond; but not beyond that extent, although the plaintiff hath brought separate actions against the distrainee and the sureties (*t*). And the court, upon application, will stay the proceedings in the action or actions on the bond, on payment of these sums (*u*). But the verdict, in form, is for the recovery of the debt and one shilling damages.

Staying proceedings.] By stat. 11 G. 2, c. 19, s. 23, "the court where such actions shall be brought, may, by a rule of the same court, give such relief to the parties upon such bond, as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeazance to such bond."

The verdict we have seen is for the debt, that is to say, the penalty of the bond, which may or may not exceed the sum to which the landlord may be fairly entitled. The landlord is entitled to the value of the goods which have been taken out of his possession by the replevin, if the rent due to him at the time of the distress amount to that sum; but otherwise only to the amount of the rent so due. He is also entitled to such costs as he would be allowed in the replevin suit. And if the penalty of the bond exceed these sums, the court will at any time relieve the sureties, upon payment of these sums, the costs of the action on the bond, if any, and the costs of the application (*v*).

Where an application was made to stay the proceedings in an action on a replevin bond, it appeared that the tenant, by mistake, had omitted to enter a plaint at the next county court, and the landlord had therefore taken an assignment of the bond, and brought an action upon it; but the replevin suit had afterwards been commenced, and was then pending: the court, however, refused to interfere, because the application was made on behalf of the principal to the bond, and not of the sureties (*w*).

(*r*) *Faulkner v. Johnson et al.*, 11 Mees. & W. 581.

(*s*) *Hunt v. Round*, 2 Dowl. 558. *Ward v. Henley*, 1 Y. & J. 285.

(*t*) *Hefford v. Alger*, 1 Taunt. 218.

(*u*) *Hunt v. Round*, *supra*.

(*v*) *Hunt v. Round*, 2 Dowl. 558.

Miers v. Lockwood, 9 Dowl. 975.

Gingell v. Turnbull, 3 Bing. N. C. 881.

(*w*) *Warton v. Blackwell*, 13 Law J. 112, *ex*.

PART IV.

TENANT'S REMEDIES AGAINST HIS LANDLORD.

CHAPTER I. *For Breach of Contract.*

CHAPTER II. *For Wrongful or Irregular Distress.*

CHAPTER III. *The Tenant's remedy against the Landlord, for entry without cause.*

CHAPTER IV. *The Tenant's remedy when an Ejectment is brought for a Forfeiture.*

CHAPTER V. *The Tenant's remedy for Expulsion by a Stranger.*

CHAPTER VI. *The Tenant's remedy against his Landlord, for allowing him to be Distrained upon for Rent due to the Head Landlord.*

CHAPTER VII. *Right of the Tenant, &c. to Emblements.*

CHAPTER I.

The Tenant's Remedies against the Landlord for Breach of Contract.

SECTION I.

Tenant's Remedy for breach of Covenant generally.

If the demise were by deed, and the lessor be guilty of a breach of any of the covenants in it upon his part to be performed, the lessee may maintain an action of covenant against him, to recover the amount of the damages he, the tenant, may have thereby sustained. The only implied covenant and the usual express covenants upon the part of a landlord are,

as to his title to make the lease in question, and for the quiet enjoyment of the tenant during the term ; and which we shall have occasion to consider particularly in the two next sections ; but as there may be express covenants in the lease, upon the part of the landlord, for other purposes, we shall here consider, generally, the client's remedy for breach of a covenant upon the part of the landlord, and which must be of course by action of covenant.

Declaration in Covenant by Lessee against Lessor.

In the Queen's Bench.

The — day of —, A.D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the defendant by deed let to the plaintiff a house, No. 401, Piccadilly, to hold for seven years, from the — day

of —, A.D., —, and the defendant by the said deed covenanted * [*§c.*, *setting out the covenant as in the deed, but in the past tense, using "had" for "have," "should" for "shall," "would" for "will," and the like;*] yet the plaintiff saith that [*§c.*, *here state the breach:*] And the plaintiff claims £—.

A declaration by the lessee against the assignee of the reversion, or by the assignee of the lessee against the lessor or assignee of the reversion, for a breach of any covenant running with the land, may readily be framed from the above form, and the forms *ante*, p. 185, 189.

Plea, Non est factum.

In the Queen's Bench.

The — day of —, A.D. 18—.

C. D. } The defendant, by G. H., his attorney, says that the alleged deed
ats. }
A. B. } is not his deed.

General Traverse of a Negative Breach.

And for a further plea in this behalf, the defendant says that [*§c.*, *stating the affirmative of the breach*].

General Traverse of an Affirmative Breach.

And for a further plea in this behalf, the defendant says that [*§c.*, *stating the negative of the breach*].

Under the first of the above pleas, the plaintiff has merely to produce and prove the execution of the deed declared upon, and to prove the amount of the damages, if those be unliqui-

dated. And the defendant on the other hand may contest these; or he may object to the deed being given in evidence for want of a proper stamp (a); or may object for variance between the deed set out, and that given in evidence (b).

Under the second plea, the plaintiff must give some general evidence of the negative in the breach, and must prove the amount of the damages, if unliquidated. And the defendant, on the other hand, may prove his performance of the covenant.

Under the last of the above pleas, the plaintiff must prove the breach, and his damages if unliquidated; and the defendant may give evidence to the contrary (c).

SECTION II.

The Tenant's Remedy against his Landlord, for Breach of Covenant for Title.

In what cases.

Implied covenant.] From the word "*demisi*" in a lease, the law implies a covenant upon the part of the landlord, that at the time of the delivery of the lease, he had full power and authority to demise the premises to the lessee for the time and on the terms expressed in the lease (d). If A. by indenture, lease to B. the land of C., and of which C. is seised at the time, upon which B. enters, and then C. re-enters,—B. shall have an action of covenant upon this indenture, although he was not in possession by the lease, but by the estoppel; for A. is concluded, by the estoppel, from saying that the lessee was not in of his lease (e). So, if a man lease to me the land of J. S., and of which J. S. is seised at the time, I shall have a writ of covenant against the lessor, before entry by me upon J. S. and re-entry by him: for this being a covenant in law, which is broken by the lessor, by his not being seised of the land at the time of the demise, I need not allege an eviction;—the word "*demise*" imports a power of letting, and it is not reasonable to force the lessee to enter, when his entry would make him a trespasser (f). Where however the demise is by parol, the law will not imply an agreement for good title (g).

But if the lessor have title at the time of the demise, the implied covenant is holden to subsist only during his life, so

(a) See *ante*, pp. 42, 43.

(b) See 1 Arch. N. P. 2nd Ed. p. 365.

(c) *Id.* p. 360.

(d) *Holder v. Taylor*, Hob. 12.
Fraser v. Skey, 2 Chit. 640. Per

Littledale, J., in *Burnet v. Lynch*, 5 B. & C. 609.

(e) Ro. Abr. 520. Cro. Jac. 73.

(f) Ro. Abr. 520. *Holder v. Taylor*, Hob. 12.

(g) *Bandy v. Cartwright*, 22 Law J. 285, ex.

that no action upon it will lie against his executors, for an ouster happening after his death (*h*). And therefore, where a tenant for life leased his lands for fifteen years, without any express covenant for quiet enjoyment, and died before that term had expired; and the remainderman entered upon the lessee, and ousted him: the court held that the lessee could not maintain an action of covenant against the executors of the tenant for life, for this breach of the implied covenant for title or quiet enjoyment (*i*).

So, if the lease contain an express covenant for title, or for quiet enjoyment, this altogether supersedes the implied covenant for title above-mentioned, and the remedy for the lessee is confined to the express covenant alone. Where a lease by deed contained an express covenant for quiet enjoyment, during the term, without any let, hinderance or interruption from the lessor, his executors, &c., or any person claiming from, under, or in trust for him, but contained no covenant for title; and the lessee, treating the word "demise" in the lease, as raising an implied covenant for title, brought an action upon the covenant for quiet enjoyment, but assigned as a breach that the lessor, at the time of making the lease, had not power or authority to grant the plaintiff a lease for the term in the deed mentioned, by means whereof he lost certain money laid out in repairs and improvements; and to this there was a demurrer: for the defendant it was argued, that the express covenant for quiet enjoyment, qualified the covenant for title or quiet enjoyment to be implied from the word *demisi* in the lease, and secondly, that the breach assigned was no breach of the covenant stated, showed no eviction, and, for anything that appeared, the plaintiff had not in any manner been interrupted in his occupation: for the plaintiff it was argued, that two distinct covenants were to be implied from the word *demisi*,—a covenant for title, and a covenant for quiet enjoyment; and that an express covenant for quiet enjoyment superseded only the implied covenant for quiet enjoyment, but did not affect the other implied covenant for title; and as to the alleged variance between the covenant and breach in the declaration, it was competent to the plaintiff either to set the matter out according to its legal effect, and declare upon the covenant for title, or to set it out as it really was, and let the covenant be implied from it:—but the court held that, although where there are two express covenants, one for title and the other for quiet enjoyment, the one does not qualify or control the other, yet an express covenant

(*h*) *Swan v. Searles*, Dy. 257 b. Bendl. 150. *Bragg v. Wiseman*, 1 Brownl. 22. *Hyde v. Canons of Windsor*, Cro. El. 553.

(*i*) *Adams v. Gibney et al.*, 6 Bing. 656.

will qualify and control all the covenants which are merely implied from words in the lease; and that in this case, the lessor was not bound beyond the terms of his express covenant for quiet enjoyment (*k*). A writ of error was afterwards brought upon this judgment; but the court of error were of the same opinion, and affirmed the judgment (*l*).

Express covenant.] The usual form of the express covenant is thus: that the lessor, "at the time of the sealing and delivery hereof, hath full and lawful power and authority to grant and demise the messuage or tenement and premises hereby demised, leased or otherwise assured, or intended so to be, at, for and upon the rent, term and conditions hereinbefore reserved and contained respecting the same, and according to the true intent and meaning of these presents." And if in fact the lessor had not at the time the title^o here mentioned, the lessee may maintain an action against him upon the covenant, although he have not been evicted, or hindered or disturbed in his occupation, by reason of the lessor's breach of it (*m*). And it is not deemed to be superseded, qualified or controlled by any express covenant for quiet enjoyment or the like, contained in the lease (*n*).

Declaration.

Same as the last form, ante, p. 266, to the asterisk, and then thus: That [at the time of the making of the said deed, he the defendant had full and lawful power and authority to grant and demise the messuage or tenement and premises by the said indenture demised, leased, or otherwise assured, or intended so to be, at, for and upon the rent, term and conditions therein reserved and contained respecting the same, and according to the true intent and meaning of the said indenture]: Yet the plaintiff saith that at the time of the making of the said deed, he the defendant had not full or lawful power or authority to grant or demise the messuage or tenement and premises aforesaid, for the term or upon the terms or conditions in the said indenture reserved and contained respecting

the same, [and if you state special damage, such as eviction by one having title or the like, it may be thus: "for that one G. H., at the time of the making of the said deed, and continually from thence until and at the time of the eviction and expulsion hereinafter mentioned, had lawful right and title to the said demised premises, and having such lawful right and title, he the said G. H. heretofore, and after the making of the said deed, and during the term aforesaid, to wit, on —, entered into the said house and premises upon the possession of the plaintiff, and ejected, expelled, put out and removed the said plaintiff from the possession thereof and kept and continued him the plaintiff so ejected, expelled, put out and removed, from thence hitherto.]]

And the plaintiff claims £—.

(*k*) *Line v. Stephenson et al.*, 4 Bing. N. C. 676.

(*l*) *Id.* 5 Bing. N. C. 183.

(*m*) *Holder v. Taylor*, Hob. 12.

(*n*) *Norman v. Foster*, 1 Mod. 101, per Hale, C. J.; *Fraser v. Skey*, 2 Chit. 646.

The declaration may be in this form, whether it be on an implied or express covenant.

The breach may be as general as the covenant, namely, that the defendant had not full or lawful power or authority to grant or demise the premises, &c., without stating any eviction or interruption (c). Where the declaration stated "that the defendant at the time of making the said indenture, had not full power and lawful authority to demise the premises, according to the form and effect of the said indenture;" and after verdict and judgment for plaintiff, it was assigned for error, that the plaintiff in his declaration had not shown what person had right, title, estate or interest in the demised premises at the time of the making of the indenture, by which it might appear to the court that the defendant had not full power and lawful authority to demise the premises: but it was holden that the assignment of the breach of covenant was good, the plaintiff having followed the words of the covenant in the negative, and that it lay more properly in the knowledge of the lessor what estate he had in the land which he demised, than of the lessee who was a stranger to it; and therefore the defendant ought to show what estate he had in the land at the time of the demise made, that it might appear to the court that he had full power and lawful authority to demise it (d). So, where in covenant, the declaration stated that the defendant by indenture demised to the plaintiff a messuage and certain land in C. for 60 years, and covenanted that he was then lawfully seised in fee of an indefeasible estate, and assigned a breach that at the time of making the indenture he was not lawfully seised in fee; the defendant pleaded *non est factum*; and after verdict for the plaintiff, it was moved in arrest of judgment that the declaration was bad, because the breach was too general, not showing that any other person was seised, nor any cause why the defendant was not seised: but the objection was overruled, because as the covenant was general, so the breach assigned generally was good, especially after *non est factum*, which admitted the breach if it had been his deed (e). So, where in debt on bond, defendant demanded oyer of the condition, which was to perform covenants, one of which was, that the defendant covenanted that he was seised of an indefeasible estate in fee simple, and the defendant pleaded covenants performed; the plaintiff replied that the defendant was not seised of an indefeasible estate in fee simple; and the defendant demurred generally, because he supposed that the plaintiff ought to have shown of what estate the defendant was seised,

(c) See *Holder v. Taylor*, Hob. 12, *supra*.

(d) *Bradshaw's case*, 9 Co. 60 b.

Cro. Jac. 304; Co. Ent. 116, 117; *Lancashire v. Glover*, 2 Show. 460.

(e) *Muscot v. Ballet*, Cro. Jac. 369.

as in presumption of law he had parted with all his writings concerning the land to the plaintiff, and the plaintiff therefore well knew the title; and it was not like Bradshaw's case, for there the covenant was with the lessee for years, who had not the writings: but the court held that the breach was well assigned, according to the words of the covenant, and judgment was given for the plaintiff(*f*).

But if no special damage be laid and proved, the jury, it should seem, will not be warranted in giving more than nominal damages.

Where eviction is laid as special damage, it is not necessary to state what title the party had who evicted the plaintiff; it is sufficient to say, generally, that he had lawful right and title(*g*).

Pleadings and Evidence.

The form of the plea of *non est factum*, and of a general traverse, will be found *ante*, p. 266. Under *non est factum*, the plaintiff will merely have to prove the execution of the lease. Under a traverse of the breach, the plaintiff will have to prove it, that is to say, he must give general evidence to show that the defendant had not, at the time of the execution of the lease, a sufficient title to grant a lease for the term or upon the conditions therein mentioned. And where an eviction is laid as special damage, the plaintiff, in order to prove it, must not only prove the eviction, but that the party who evicted him had lawful title to do so(*h*). Where the action was brought against two executors of the lessor, and the defendants were the very persons who evicted the plaintiff,—in order to prove that they had lawful title to do so, it was proved that one of them said that the property belonged to him and the other defendant, and that they were entitled to it under a deed of gift prior to the lease: the court held that this was not sufficient; the plaintiff should have proved title in both, and here the admission of one was no evidence against the other(*i*).

SECTION III.

The Tenant's Remedy against his Landlord, for Breach of a Covenant for Quiet Enjoyment.

Implied covenant.] From the word "*demisi*" in a lease, the law implies a covenant for quiet enjoyment during the

(*f*) *Glinister v. Audley*, T. Raym. 14; 2 Saund. 181, b. c.

(*g*) *Foster v. Pierson*, 4 T. R. 617; *Hodgson v. East India Company*, 8 T. R. 281, 283.

(*h*) Per Lord Denman, C. J., in *Fox v. Waters et al.*, 12 Ad. & El. 51, 43.

(*i*) *Fox v. Waters et al.*, 12 Ad. & El. 43.

term; and it is deemed a covenant, not only against the acts of the lessor and all claiming through or under him or in trust for him, but against the act of every person having lawful title. Therefore, where a lessee is ousted, either by the lessor himself, or another person who has a prior title, an action of covenant lies against the lessor on the implied covenant in law upon the word "*demise*" (z).

But this, like the implied covenant for title, is deemed to subsist only during the life of the lessor, and that no action will lie upon it against his executors, for an ouster happening after his death (a). And therefore, where a tenant for life leased his lands for fifteen years, without any express covenant for quiet enjoyment, and died before that term had expired; and the remainderman entered upon the lessee, and ousted him: the court held that the lessee could not maintain an action of covenant against the executors of the tenant for life, for this breach of the implied covenant for quiet enjoyment (b).

So, if the lease contain an express covenant for quiet enjoyment, this altogether supersedes the implied covenant to the same effect, and the remedy for the lessee is confined to the express covenant alone (c). And therefore, where a lessor would limit his responsibility for the quiet enjoyment and occupancy of his lessee, it is necessary that he should have an express covenant for quiet enjoyment introduced into the lease, defining exactly against what acts, and of whom, the lessee is to be protected.

But the implied covenant for quiet enjoyment does not extend to the acts of a mere wrong-doer; against such a person the tenant has his remedy by action of trespass, or ejectment (d). And the breach in the declaration, showing an eviction, must state it expressly to have been by a person having lawful title (e).

Upon a parol demise, also, the law will imply an agreement for quiet enjoyment, but not for good title (f).

Express covenant.] The express covenant for quiet enjoyment is usually worded thus:—that the lessee, "his executors, administrators and assigns, paying the yearly rent hereby reserved at and upon the days and times and in the manner

(z) 1 Saund. 322, a (n.2). *Nokes's case*, 4 Co. 80 b. Cro. El. 674. Dy. 257 a, pl. 13. 1 Ro. Abr. 519, F. pl. 1. *Andrews's case*, 2 Leon. 104. *Style v. Hearing*, Cro. Jac. 73.

(a) *Swan v. Searles*, Dy. 257, b. Bendl. 150. *Bragg v. Wiseman*, 1 Brownl. 22. *Hyde v. Canons of Windsor*, Cro. El. 553.

(b) *Adams v. Gibney et al.*, 6 Bing. 656.

(c) See *Line v. Stephenson et al.*, 5 Bing. 183, ante, p. 269. 4 Co. 80 b, Cro. El. 674, Yelv. 175.

(d) 26 H. 8, 3 b.

(e) Vide *infra*.

(f) *Bandy v. Cartwright*, 22 Law J. 285, ex.

hereinbefore appointed for payment thereof, and performing and observing the covenants and agreements hereinbefore contained by him and them to be performed and observed, shall and lawfully may peaceably and quietly have, hold, use, occupy and enjoy the same messuage or tenement and premises, with their respective rights, members and appurtenances, for and during the term of — years, expressed to be hereby granted thereof, without any lawful denial, let, hindrance, molestation or interruptions whatsoever, of or by him the said [lessor], his heirs or assigns, or any other person or persons claiming by, through or under him, or in trust for him." But it depends entirely upon the agreement between the parties, in what manner this covenant shall be expressed, so as to define exactly for what acts, and of whom, the lessor is to be responsible. The lessor, however, cannot be rendered liable for the acts of a mere wrong-doer by such a covenant, unless made so by the express words of the covenant. Even where the covenant was for quiet enjoyment, without the let of the defendant and his heirs, and "of all and every other person or persons whomsoever," it was holden that these words meant lawful interruptions, and not the let or interruption of a stranger having no right (*g*). So, where the condition of a bond was, that if the obligee enjoy, &c., "according to the indenture," without the let or interruption of "any person," it was holden that if he were ousted by one who had no right, the bond was not forfeited, for it should be intended to mean "lawful interruption;" and, per Periam, J., it would be the same, if the words "according to the indenture" had been omitted (*h*). But where, upon the purchase of lands, the vendor gave to the vendee a bond, conditioned to save the vendor and the lands harmless from all manner of mortgages, judgments, extents, executions and other incumbrances, had and obtained, or thereafter to be had and obtained, by T. T. or any other person,—it was holden to bind the obligor against the wrongful entry of T. T. (*i*). And *Ld. Ellenborough, C. J.*, in this latter case, took the distinction between a covenant against the acts of all persons, and a covenant against the acts of a particular person by name: he said that where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title; and the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest, and therefore the law has properly

¹ (*g*) *Dudley v. Folliott*, 3 T. R. 587.

(*i*) *Nash v. Palmer*, 5 M. & S. 374.

(*h*) *Dy. 328*, in marg.

V restrained it within its reasonable import, that is, to rightful title ; but it is different where an individual is named ; for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise (*k*).

It remains then to state, against whom, and against what acts, the general covenant above mentioned is an indemnity. An eviction of the tenant, by a party having title, is clearly within it. A disturbance of a way of necessity is within it (*l*). So, a subtraction of water from a mill demised seems to be within it ; but where there was a demise of a mill, and of a stream of water flowing through a leat or trench in the land of the lessor, except so much of the water as should be sufficient for the supply of persons whom the lessor should have already contracted with, or should thereafter contract to supply, provided that such a quantity should be left as should be sufficient to supply the mill for twelve hours a day ; and there was a covenant that the lessee should enjoy, &c., without interruption of the lessor, or of persons claiming by his act, means, consent, default, privity or procurement : it was holden that diversions of the water, occasioned by contracts previous to the demise, were no breach of this covenant for quiet enjoyment (*m*). So, where the lessor covenanted with the lessee for quiet enjoyment of the demised premises, without interruption by the lessor, or by any person lawfully claiming “ by, from, or under him ; ” and during the demise the lessee was distrained upon for arrears of land-tax, due from the lessor at the time of the demise : it was holden that the distress was not a breach of the covenant, the claim for land-tax not being a claim by, from, or under the lessor (*n*). But where a fine was levied of a feme covert’s estate, with a joint power to the husband and wife to declare the uses, and the uses were declared to the husband and wife, for life, with remainder to A. ; and the husband then leased the land to B., and covenanted for quiet enjoyment without let or hinderance from him or any person claiming under him ; and upon the husband’s death A. entered upon the lessee, and ousted him : it was holden that the lessee might maintain an action on this covenant against the executors of the husband ; for by the deed to declare the uses, A. claimed under the husband, within the meaning of the covenant (*o*). So, where tenant for life under a marriage settlement, with power to grant leases for years de-

(*k*) 5 M. & S. 379, 380.

(*l*) Per Mansfield, C. J., in *Morris v. Edgington*, 3 Taunt. 24.

(*m*) *Blatchford v. Mayor of Plymouth*, 3 Bing. N. C. 691.

(*n*) *Stanley v. Hayes*, 2 Gale & D. 411.

(*o*) *Hurd v. Fletcher et al.*, 1 Doug. 43.

terminable on three lives, granted a lease to A., during the life of A. and his two sons, and the survivors and survivor, covenanting for quiet enjoyment during the said term, without interruption of him the lessor, his heirs and assigns, or any other person claiming any estate, &c., under him or any of his ancestors; the lessor died, and his eldest son, who was tenant in tail under the settlement, evicted the eldest son of the lessee, the third life in the lease being still in being: it was holden that this eviction of the tenant was a breach of the covenant for quiet enjoyment (*p*). But where tenant for life, and his eldest son, who was remainderman in tail, let certain premises to A. for ninety-nine years; and A. underlet them to B. for sixty years, with a covenant for quiet enjoyment during the term "without any lawful let, suit, trouble, eviction, ejection, molestation or interruption of or by the said A., his heirs, executors, administrators or assigns, or of or by any other person or persons whomsoever, lawfully claiming or to claim by, from or under him or any of them, or by his, their or any of their acts, means, consent, neglect, default, privity or procurement:" the tenant for life and his son (the lessors in the original lease) died, and the ultimate remainderman entered upon B., and ousted him: it was holden that B. could not maintain an action on this covenant for quiet enjoyment against A. for this ouster; for the ultimate remainderman did not claim by, from or under him, nor was the eviction occasioned by any act, neglect, default, &c., of A. or those claiming under him (*q*). In this last case, it was argued that it was by the neglect and default of A., in not insisting on a common recovery being suffered by the lessor, tenant in tail, before the lease was granted, that the eviction was caused; but the court held that this was no neglect or default within the meaning of the covenant, it not appearing that A. had the power to compel the parties to suffer a recovery (*r*). So, where the governors of the Foundling Hospital granted a lease of a dwelling-house to A. for a term of years, with a clause of re-entry if the lessee or his assigns should convert the house into a shop, without the consent in writing of the lessors; A. underlet it to B. for a shorter term, the lease omitting the clause respecting the shop, and containing a covenant for quiet enjoyment, "without any lawful let, suit, trouble, molestation, eviction, interruption, claim, or demand whatsoever by or from A., his executors, administrators or assigns, or any person or persons whomsoever, claiming or to claim by, from, under, or in trust for him, them or any of them, or by or through his or their acts, means, right, title, forfeiture, privity

(*p*) *Evans v. Vaughan*, 4 B. & C. 261.

(*q*) *Woodhouse v. Jenkins*, 9 Bing. 431.

(*r*) *Id.*

or procurement ;" B. assigned to C. ; and C. underlet to D., who, not knowing of the clause respecting the shop in the original lease, incurred a forfeiture by converting the house into a shop ; and the original lessors thereupon entered upon D., and ousted him : it was holden that C. could not maintain an action on the covenant for quiet enjoyment, against the executors of A., who had died, for this ouster of D. ; for the words " acts" and " means" in the covenant, mean some act done, and the eviction did not arise from any act done by A., or by any person claiming by, from, under or in trust for him ; if A. were guilty of any improper concealment, that might be made the subject of an action on the case, but not of the present action (s).

Covenants for title (t), and for quiet enjoyment (u), run with the land ; and therefore the lessee or assignee of the term may maintain an action upon them against the lessor or assignee of the reversion (v). And where A. demised by lease to B., and B. assigned his term to C., covenanting with C. and his assigns for quiet enjoyment ; and C. assigned to D., who however was afterwards ejected by A., for a forfeiture incurred by B. before his assignment to C. : it was holden that D. might maintain an action against B. on his covenant for quiet enjoyment (w).

Where the covenant is, in form, that, upon payment of rent and performance of covenants, the lessee shall quietly enjoy, &c., the payment of rent or performance of covenants is not a condition precedent to the right of the tenant to the quiet enjoyment under the covenant ; but he may bring his action for any eviction or disturbance in his possession, although he have been guilty of a default in the payment of his rent or performance of his covenants (x). And where, in such a case, the tenant brought his action on the covenant, and the defendant pleaded that before and at the time of the disturbance complained of, the tenant was guilty of a breach of covenant in non-payment of rent, and in not insuring : the court held that this was no answer to the action (y).

Declaration.

Same as the form, ante, p. 266, to the asterisk, and then thus :* That [the plaintiff, his executors, administrators and assigns, paying the

yearly rent thereby reserved, at and upon the days and times and in the manner therein appointed for payment thereof, and perform-

(s) *Spencer et al. v. Marriott*, 1 B. & C. 457.

(t) *Kingdom v. Nottle*, 4 M. & S. 53.

(u) *Williams v. Burrellet et al.*, 14 Law J. 98, cp.

(v) See 1 Arch. N. P. 2nd Ed. 357, 358.

(w) *Campbell v. Lewis*, in error, 3 B. & A. 392.

(x) *Dawson v. Dyer*, 5 B. & Ad. 584.

(y) *Id.* See *Brookes v. Humphreys*, 5 Bing. N. C. 55.

ing and observing the covenants and agreements therein contained by him and them to be performed and observed, should and lawfully might peaceably and quietly have, hold, use, occupy and enjoy the same messuage or tenement and premises, with their respective rights, members and appurtenances, for and during the term of — years, expressed to be thereby granted thereof, without any lawful denial, let, hinderance, molestation or interruption whatsoever, of or by him the said defendant, his heirs or assigns, or any other person or persons claiming by, through or under him, or in trust for him:] Yet the plaintiff saith, that after the making of the said deed, and after he entered upon and had possession of the messuage or tenement and premises aforesaid, and during the term so thereof granted as afore-

said, to wit, on —, [one G. H. then lawfully claiming the said messuage or tenement and premises, through and under the defendant, and having before and at the time of the making of the said indenture of lease to the plaintiff as aforesaid, and continually from thence until and at the time of the eviction and expulsion hereinafter mentioned, full, just and good title to the same and to the possession thereof, into and upon the messuage or tenement and premises aforesaid did enter, and the plaintiff therefrom and from the possession thereof under the demise aforesaid, did rightfully and wholly put out, eject, expel and amove, and kept and continued him the plaintiff so put out, ejected, expelled and amoved from thence hitherto. And the plaintiff claims £—.

It is sufficient to state that the party who evicted had lawful title to the premises, and claimed the same under the defendant, or some person claiming through or under him, according to the terms of the covenant, without stating what that title is (z). And where the declaration stated a lease granted by the defendant to C., under whom the plaintiff derived title by several mesne assignments, in which lease the defendant covenanted for quiet enjoyment, "without the let or interruption of the defendant, his heirs or assigns, or of any other person whomsoever," and then assigned a breach, "that the defendant, at the time of making the said indenture of demise, or at any time before or afterwards hitherto, had not any right or title whatsoever to make the said lease of the said premises to the said C., nor could the plaintiff, by virtue of the said demise, since the said assignment made to him as aforesaid, peaceably and quietly have, hold, occupy, possess and enjoy the said demised and assigned premises, or any part thereof; for that one J., at the time of making the said indenture of demise, and continually from thence until and at the time of the eviction and expulsion hereinafter mentioned, had lawful right and title to the said demised premises, and having such lawful right and title, entered into the said premises upon the possession of the plaintiff, and ejected, expelled, put out and removed the said plaintiff from the possession thereof,"

(z) *Hodgson v. East India Co.* 8 T. R. 278. And see *Bradshaw's case*, 9 Co. 60 b; *Cro. Jac.* 304. *Lancashire v. Glover*, 2 Show. 400.

Muscot v. Ballet, *Cro. Jac.* 369 *Glinister v. Audley*, T. Raym. 14 ante, p. 270, 271.

&c. ; and upon demurrer, it was objected that it did not appear in the declaration what right, claim or title J. had to enter the demised premises, and evict the plaintiff : but the court overruled the objection, and held that it was sufficient to allege that at the time of the demise to C., J. had lawful right and title to the premises, and having such right and title entered and evicted the plaintiff, without showing what title J. had (*d*). But it is necessary to show that the party evicting not only had title, but that he had it before and at the time of the making of the indenture of demise (*e*), or in some other manner to negative the supposition that he derived his title from the plaintiff himself (*f*). If, however, the party evicting be the lessor himself, it is not necessary to allege that he had title, for the action is brought upon the presumption that he had no title which would warrant his entry ; it is sufficient if it appear that the interruption was in assertion of some claim of right (*g*). And the same, where the eviction is by the heir or executor of the covenantor, and the covenant is for quiet enjoyment without the let or interruption of the covenantor, his heirs or executors (*h*). And it does not seem to be necessary to state that the plaintiff was evicted by legal process, although the fact be so (*i*). But it is necessary to show some particular act by which the plaintiff was interrupted, for otherwise the breach would not be well assigned (*k*).

The pleadings and evidence are the same as in the last section.

SECTION IV.

The Tenant's Remedy against his Landlord, for Breach of Contract not under Seal.

If in a demise not under seal there be an express agreement upon the part of the landlord for title or for quiet enjoyment, and the tenant sustain any damage by the breach of it, he may have his remedy by action of assumpsit, in the same manner as he may sue in covenant where the demise is by deed. He cannot, however, sue in assumpsit, as upon an im-

(*d*) *Foster v. Pearson*, 4 T. R. 617.

(*e*) *Skinner v. Kilbys*, 1 Show. 70. *Eeles v. Lambert*, Al. 38. *Buckly v. Williams*, 3 Lev. 325.

(*f*) *Brookes v. Humphreys*, 5 Bing. N. C. 55.

(*g*) *Lloyd v. Tomkies*, 1 T. R. 671.

(*h*) F. N. B. 342, K. *Forte v. Vines*, 2 Ro. Rep. 21. *Penning v. Plat*, Cro. Jac. 383. *Core's case*, 1 Ro. Abr. 430, pl. 11; Cro. El. 544. *Crosse v. Young*, 2 Show. 425.

(*i*) *Foster v. Pearson*, 4 T. R. 617, 620.

(*k*) *Fraunce's case*, 8 Co. 91, a, b. *Anon. Com. Rep.* 228.

plied contract for title or quiet enjoyment; for no such contract can by law be implied from the mere relation of landlord and tenant (l). In one case, indeed, it was holden that where a man lets a house, he impliedly undertakes that it is habitable, and free from any serious nuisance; and therefore where a tenant, upon entering into possession of a furnished house, found it so infested with bugs that it was impossible to dwell in it, and left it,—it was holden that he was liable to pay only for the time he actually occupied (m). But the authority of this case is very much shaken; and it has been holden that, at all events, if the house be let upon lease, there is no such implied warranty (n). So, on the letting of land or aftermath, &c., there is no implied warranty that it is fit for the use for which the lessee requires it (o). Nor is the landlord under any implied obligation to make any repairs upon the demised premises (p). But where there is an express contract upon the part of the landlord, on these or on any other subjects relating to the tenancy, he is bound to perform it, and the tenant may have his remedy against him by action of assumpsit if he do not perform it, in the same manner as in other cases of breach of a contract not under seal. The following may in general be the form of the

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues J. S., the defendant in this suit: For that heretofore, to wit, on —, by a certain agreement then made by and between the plaintiff of the one part and the defendant of the other part, the defendant for the consideration

therein mentioned agreed that [*&c., setting out the agreement in the past tense:*] Yet the plaintiff saith that the defendant, not regarding his said agreement afterwards, to wit, on —, [*&c., stating a breach of the agreement specially; where-by, " &c., stating special damage, if any:"*] And the plaintiff claims £—.

The pleadings and evidence are the same as in ordinary cases of assumpsit (q).

(l) *Granger v. Collins*, 6 Mees. & W. 459.

(m) *Smith v. Marrable*, 11 Mees. & W. 5.

(n) *Hart v. Windsor*, 12 Mees. & W. 68. See *Keates v. Earl of Cadogan*, 20 Law J. 76, cp.

(o) *Sutton v. Temple*, 12 Mees. & W. 52.

(p) *Arden v. Pullen*, 10 Mees. & W. 321.

(q) See 1 Arch. Nisi Prius, 2nd Ed. p. 142, *et seq.*

CHAPTER II.

The Tenant's Remedies for a Wrongful or Irregular Distress.

A distress is said to be wrongful when no rent is due at the time, or not so much rent as is distrained for, or where an excessive distress is taken, or where goods are distrained which are not by law the subject of a distress; it is said to be irregular where, although the distress itself is legal, some of the proceedings thereon are not in conformity with the statutes by which they are regulated.

By stat. 11 G. 2, c. 19, s. 19, after reciting that it hath sometimes happened upon a distress made for rent justly due, the directions of stat. 2 W. & M. sess. 1, c. 5 (a), have not been strictly pursued, but through the mistake or inadvertency of the landlord or other person entitled to such rent and distraining for the same, or of the bailiff or agent of such landlord or other person, some irregularity or tortious act hath been afterwards done in the disposition of the distress so seized or taken as aforesaid, for which irregularity or tortious act the party distraining hath been deemed a trespasser *ab initio*, and in an action brought against him as such the plaintiff hath been entitled to recover, and has actually recovered the full value of the rent for which such distress was taken: And further reciting that it is a very great hardship upon landlords and other persons entitled to rents, that a distress duly made should be thus in effect avoided for any subsequent irregularity:—it is enacted, that “where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers *ab initio*, but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass or on the case, at the election of the plaintiff or plaintiffs: provided always, that where the plaintiff or plaintiffs shall recover in such action, he, she, or they shall be paid his, her, or their full costs of suit, and have all the like remedies for the same, as in other cases of costs.”

The words “action of trespass or on the case,” in the above section, have no reference to the original distress, but merely to the act or omission which constitutes the irregularity; and

(a) *Ante*, p. 133.

if that, of itself, be the subject of an action of trespass, trespass must be brought for it; if of an action on the case, an action on the case alone will lie. And therefore where the irregularity consisted of selling the goods without having them appraised, it was holden that trespass would not lie, because an omission cannot be a trespass (b).

By sect. 20, it is provided, that "no tenant or tenants, lessee or lessees, shall recover in any action for any such unlawful act or irregularity as aforesaid, if tender of amends hath been made by the party or parties distraining, his, her or their agent or agents, before such action brought."

And by sect. 21, "in all actions of trespass or upon the case, to be brought against any person or persons entitled to rents or services of any kind, his, her or their bailiff or receiver, or other person or persons,—relating to an entry by virtue of this Act, or otherwise, upon the premises chargeable with such rents or services,—or to any distress or seizure, sale or disposal of any goods or chattels thereupon,—it shall and may be lawful to and for the defendant or defendants in such actions to plead the general issue, and give the special matter in evidence; any law or usage to the contrary notwithstanding: And in case the plaintiff or plaintiffs in such actions shall become nonsuit, discontinue his, her or their action, or have judgment against him, her or them, the defendant or defendants shall recover double costs of suit."

As to the privilege here given, of pleading the general issue and giving the special matter in evidence, the landlord is at liberty to avail himself of it, or not, as he may think fit (c). If he do, it is required that he should insert the words "By statute" in the margin of his plea (d). If he plead specially, he will be holden to the same strictness precisely, as if this privilege of pleading the general issue and giving the special matter in evidence under it had never been granted (e).

As to costs, the above statute is now altered: By stat. 5 & 6 Vict. c. 97, s. 2, instead of "double costs," he shall have "such full and reasonable indemnity as to all costs, charges and expenses incurred, in and about the action, "as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer." And this, although the defendant may not have availed himself of the statute, of giving the special matter in evidence under the general issue, but has pleaded specially (f).

(b) *Messing v. Kemble*. 2 Camp. 115.

(c) Per Littledale, J., 5 Ad. & El. 411.

(d) R. G. T. 1 Vict.

(e) See *Drew v. Avery et al.*, 14 Law J. 65, ex.; and see *Eagleton v. Gutteridge*, 11 Mees. & W. 465.

(f) *Gambrell v. Earl Falmouth*, 5 Ad. & El. 403.

SECTION I.

1. *Replevin for a Wrongful Distress.*

In what cases.] The action of replevin is one of the remedies the law gives for goods wrongfully taken. It is usually brought where goods have been taken as a distress. In what cases a distress may be taken for rent in arrear has already been fully considered (*g*). Formerly the action of replevin was often brought in the *detinet*; but now the goods are actually replevied, and delivered to the plaintiff before action brought.

The action lies only for personal chattels; not for trees growing (*h*); nor for things fixed to the freehold (*i*); nor for animals *feræ naturæ*, unless reclaimed (*k*); nor for deeds or charters relating to land (*l*); nor for money (*m*); nor for leather after it has been manufactured into shoes, or the like (*n*). But it will lie for a ship, or for the sails, &c. of a ship (*o*). And if a mare in foal, or a cow in calf, be distrained, and during their detention she bring forth her young, replevin lies for the foal or calf, as well as for the mare or cow (*p*). And in general it will lie for all things which may lawfully be taken as a distress (*q*), provided they be taken in this country and not abroad (*r*). It will lie, whether the plaintiff have a general or merely a special property in the goods taken (*s*). And the goods may be replevied at any time before they are actually sold (*t*).

By and against whom.] Replevin will lie either at the suit of the party who has the general property, or the party who has a special property, in the goods which are the subject of the action (*u*); in the same manner as in the action of trespass *de bonis asportatis*. If brought by husband and wife, the declaration must show some cause for joining the wife; otherwise it will be bad upon demurrer (*v*). And the action lies against the party who took the goods, or against any party who

(*g*) *Ante*, p. 111, *et seq.*

(*h*) F. N. B. 68.

(*i*) *Dalton v. Whitem et al.*, 12 Law J. 55, qb. *Simpson v. Har- topp*, Willes, 515, per Willes, C. J. *Darby v. Harris et al.*, 10 Law J. 294, qb.; and see *Niblett v. Smith*, 4 T. R. 504.

(*k*) 2 Ro. Abr. 430; Godb. 124; 4 Co. 54.

(*l*) Bro. Abr. Repl. 34.

(*m*) Moor, 394; 2 Brownl. 139.

(*n*) Moor, 394; 2 Brownl. 139.

(*o*) March, 110; T. Raym. 232.

(*p*) Bro. Abr. Repl. 41; F. N. B. 69; Sid. 82.

(*q*) Bac. Abr. Repl. F.

(*r*) Per Pollexfen, C. J., Show, 91.

(*s*) Co. Lit. 145, Winch. 26.

(*t*) *Jacob v. King*, 5 Taunt. 451.

(*u*) Co. Lit. 145, Winch. 26.

(*v*) *Serres v. Dodd*, 2 New. Rep. 405.

caused them to be taken, or against both. So executors or administrators may sue in respect of the goods of their testator or intestate; and where the lessee of land died, and his administratrix continued in possession after the death, and during the residue of the term, it was holden that the landlord might distrain on the administratrix, as well for the rent due before, as for that due after, the death (*w*). And as by stat. 32 H. 8, c. 37, s. 1, authority is given to executors and administrators to distrain for rent due and not paid at the time of the death of their testator or intestate,—if they distrain, and the tenant bring replevin, he may of course make them defendants. Joint tenants may join in an avowry for rent; or if the avowry be by one, he must also make cognizance as bailiff of his companion (*x*). Even one of two tenants in common cannot avow alone, but must also make cognizance as bailiff of the other (*y*). And where there was an avowry by one of several coheirs in gavelkind, with a cognizance as bailiff of the other coheirs, it was holden to be sufficient, without averring any authority from the other coheirs to distrain (*z*).

Mode of replevying the goods.] The mode of replevying goods is thus: *having obtained the consent of two responsible housekeepers to join in the replevin bond, give their names to the officer whom you intend to employ; and after satisfying himself as to the responsibility of the sureties, he will give you a certificate to that effect. Take this to the office of the under-sheriff or replevin clerk, who will immediately prepare the replevin bond, and if the party and sureties be in attendance, it may then be executed; a precept to replevy the goods, directed to your officer, will then be given to you, and your officer will thereupon replevy them. As to the bond, how forfeited, and the remedy upon it, see ante, p. 255.*

2. Proceedings in the County Court.

Plaint, &c.] By the terms of the replevin bond, the party distrained upon is bound to appear at the next county court, and prosecute his suit with effect and without delay. He or his attorney must therefore enter a plaint in replevin at the office of the clerk of the county court of the district in which the distress was taken (*a*).

On entering the plaint, the plaintiff must specify and describe,

(*w*) *Braithwaite v. Cooksey et al.*, 1 H. Bl. 405.

(*x*) *Bonoyon v. Palmer*, 5 Mod. 73. *Pullen v. Palmer*, Id. 150.

(*y*) *Cully v. Spearman*, 2 H. Bl. 386.

(*z*) *Leigh v. Sheppard*, 2 Br. & B. 405.

(*a*) 9 & 10 Vict. c. 95, ss. 119, 120.

in a statement of particulars, the cattle, or the several goods and chattels, taken under the distress, and of the taking of which he complains (*b*).

The defendant is thereupon summoned; and on the day appointed for his appearance the cause is heard in a summary way, in the same manner as any other action in the county courts (*c*); or it may be tried by a jury, if either party wish it (*d*).

Where the distress has been for rent, and the defendant succeeds in the action,—if the defendant require, the judge (if the cause be tried without a jury) or the jury (if the cause be tried with a jury) shall find the value of the goods distrained, and if the value be less than the amount of rent in arrear, judgment shall be given for the amount of such value; but if the amount of the rent in arrear be less than the value so found, judgment shall be given for the amount of the rent, and may be enforced in the same manner as any other judgment of the court (*e*).

Or where the distress has been for damage feasant, and the defendant is entitled to judgment for a return,—if the plaintiff require, the judge (if the cause be tried without a jury) or the jury (if the cause be tried with a jury) shall find the amount of the damage sustained by the defendant, and judgment shall then be given in favour of the defendant, in the alternative, for a return, or for the amount of the damage so found (*f*).

Removal of the cause.] In case either party to any such action of replevin shall declare to the court in which such action shall be brought—that the title to any corporeal or incorporeal hereditaments, or to any toll, market, fair or franchise is in question,—or that the rent or damage in respect of which the distress shall have been taken, is more than the sum of twenty pounds,—and shall have become bound (*g*), with two sufficient sureties to be approved of by the clerk of the court, in such sums as to the judge shall seem reasonable, (regard being had to the nature of the claim, and the alleged value or amount of the property in dispute, or of the rent or damage,) to prosecute the suit with effect and without delay, and to prove before the court by which such suit shall be tried, that such title as is aforesaid is in dispute between the parties, or that there was ground for believing that the said rent or damage was more than twenty pounds;—then, and not

(*b*) Rule Co. Co. 193.

(*c*) Id. 194.

(*d*) Id. 81.

(*e*) Id. 195.

(*f*) Rule Co. Co. 196.

(*g*) See the form of the bond,
Arch. Pr. Co. Co., Ap. No. 101.

otherwise, the action may be removed before any court competent to try the same, in such manner as hath been accustomed (*h*).

And by a rule of the county courts, where either party is desirous of removing the plaint, in pursuance of the above statute, he shall, at least five clear days before the return of the summons, deliver to the clerk two copies of a notice, signed by himself, his attorney, or agent, stating the ground of such removal, together with the names of the two sureties whom he proposes to become bound with him, in the form in the schedule, and the clerk shall forthwith transmit one of the said copies of the said notice to the opposite party or parties, by prepaid post letter; and unless such notice is given, the party removing shall pay all the expenses to which the opposite party has been put in consequence of such non-compliance with this rule, unless the judge shall otherwise order; and in case a reasonable time has not been allowed to enable the clerk to ascertain the sufficiency of the sureties, the cause shall be postponed at the expense of the party seeking to remove, or upon such terms as the judge shall think fit (*i*).

The amount is the same as in the replevin bond to the sheriff, unless the judge otherwise order.

Having given the two copies of the notice to the clerk of the court, and entered into the bond with sureties, you then sue out a writ of *certiorari*, and deliver it to the clerk of the court at his office, who will thereupon return it, and give you the writ and return, which you will then file with the proper officer in the court above, and give notice thereof to the plaintiff, his attorney or agent.

Formerly, when the county court was not a court of record, the proper writ for removing a plaint in replevin was the writ of *recordari facias loquelam*; a *certiorari* would not lie. But as the new county courts are courts of record, a *certiorari* is now the proper writ.

3. Proceedings in the Court above.

Appearance and declaration in the court above.] As soon as the cause has been removed into the court above, the defendant should enter an appearance to it; or the plaintiff may compel him by writ of *pone per vadios* and *distringas*, &c. As this is very seldom necessary in practice, the defendant usually being willing enough to proceed in the action without compulsion, it is unnecessary further to notice it.

(A) 9 & 10 Vict. c. 95, s. 121.

(i) Rule Co. Co. 197.

But if the defendant wish to compel the plaintiff to declare, then after entering an appearance he should give the plaintiff a notice to declare within four days, otherwise judgment; and if at the expiration of the four days, the plaintiff have not declared, the defendant may sign judgment of *non pros* (q), and sue out a writ *de retorno habendo*.

Avowry.] If the plaintiff wish to compel an avowry, he must give the defendant a notice to avow in eight days, otherwise judgment; in the same manner as a notice to plead is given; and if the defendant do not avow or make cognizance in due time, the plaintiff may sign judgment by default, execute a writ of inquiry, sign final judgment, and sue out execution, in the same manner as in any other action.

Get the avowry or cognizance drawn by a counsel or a pleader, and then deliver it to the opposite attorney or agent.

Plea in bar.] The defendant may give the plaintiff notice to plead in bar within four days, otherwise judgment, in the same manner as he gives him notice to reply in other actions. And if at the expiration of the four days the plaintiff have not pleaded in bar, the defendant may sign judgment of *non pros*. As to the form of the entry, and of the writ *de retorno habendo thereon*, see Arch. Forms.

Where there were several avowries for rent, the court allowed the plaintiff to pay money into court, with respect to the rent claimed in one of them (r).

Issue, trial, &c.] The issue is the same as in ordinary cases; but it may be made up either by the plaintiff or the defendant, as both parties are actors in replevin. For the same reason, either party may give notice of trial, make up the *nisi prius* record, and enter it with the associate or judge's marshal for trial.

The proceedings upon a demurrer are also the same as in ordinary cases.

If a verdict be found for the plaintiff, it is of course for damages; and he will be thereupon entitled to his judgment and execution, in the same manner as in ordinary cases. The damages in ordinary cases, where no special damage is laid and proved, are in practice always assessed at 2*l.* 2*s.* in London, Middlesex, York, and some other places; 2*l.* 10*s.* elsewhere.

(q) See *Ward v. Creasy*, 2 Moore, 642.

(r) *Vernon v. Wynne*, 1 H. Bl. 24.

If a verdict be found for the defendant, or the plaintiff be nonsuit, the defendant at common law was entitled to judgment *de retorno habendo*, and to a writ *de retorno habendo* thereupon. But if he avow or make cognizance "for rents, customs, services, or for *damage feasant*," and the avowry, &c. be found for him, or the plaintiff be nonsuit or otherwise barred, the defendant shall recover his damages and costs against the plaintiff(s). And now, by stat. 17 C. 2, c. 7, s. 2, in case of a distress for rent, if the plaintiff shall be nonsuit after avowry or cognizance made or issue joined, or if a verdict be given against the plaintiff, the jury at the prayer of the defendant shall inquire "concerning the arrears, and the value of the goods or cattle distrained; and thereupon the defendant shall have judgment" for such arrearages, or so much thereof as the goods or cattle distrained amount unto, together with his full costs, and shall have execution thereupon by *fieri facias* or *elegit*, or otherwise as the law shall require. The defendant, however, is not bound to proceed upon any of these statutes, unless he wish it; but he may still take his judgment as at common law(t).

Writ of inquiry.] If the plaintiff have judgment by default, he may execute a writ of inquiry, sign final judgment, and sue out execution, as in ordinary cases.

But where the avowry is for rent, customs, services, or *damage feasant*, if the defendant have judgment on demurrer, or judgment of *non pros* for want of a plea in bar or subsequent pleading by the plaintiff, as in that case he is entitled to his damages, by the statutes already mentioned, *supra*, a writ of inquiry may be awarded and issued, and his damages, by stat. 21 H. 8, c. 19, or the arrears of rent and the value of the goods by stat. 17 C. 2, c. 7, ss. 3, 2, shall be assessed, and he shall have judgment accordingly. Or if the plaintiff be nonprossed before avowry, then the defendant, in cases of distress for rent, after entering judgment at common law, *de retorno habendo*(u), may enter on the roll a suggestion in the nature of an avowry, and pray a writ of inquiry to be awarded, and which is accordingly awarded and issued as above mentioned(v). In cases within this statute(w), fifteen days' notice of inquiry must be given(x).

(s) 21 H. 8, c. 19, s. 3. 7 H. 8, c. 4, s. 3.

(t) See *Hafford v. Algar*, 1 Taunt. 218.

(u) See *Baker v. Lade*, Carth. 253. *Cooper v. Sherbrooke*, 2 Wills. 116.

(v) 17 C. 2, c. 7, s. 2. See 1 Saund. 193, n. 3. 2 Saund. 286, n. 5.

(w) 17 C. 2, c. 7.

(x) Id. s. 2. *Burton v. Hickey*,

6 Taunt. 57. See the form of suggestion and award of inquiry, after nonpros for not declaring, Arch. Forms, 420, and of the writ of inquiry, inquisition, judgment, and execution, Id. 421—423; of the award of inquiry, &c. on a nonpros for want of a plea in bar, Id. 426—428; the like upon a demurrer, Id. 429.

Costs.] If the plaintiff recover, he is entitled to costs, as in other personal actions.

As to the defendant's costs: where the distress is for rent, relief, heriot, or other service, if the plaintiff "become nonsuit, discontinue his action or have judgment given against him," the defendant was formerly entitled to double costs of suit (*a*). But now, by stat. 5 & 6 Vict. c. 97, s. 2, instead of double costs, the defendant shall have "such full and reasonable indemnity as to all costs, charges, and expenses incurred" in and about the suit, as shall be taxed by the proper officer in that behalf. In all other cases he is entitled to ordinary costs only; unless otherwise ordered by some particular statute on which the distress or other proceeding may be founded.

As to costs, where there are several issues, some found for the plaintiff and some found for the defendant, see Arch. New Pr. 201.

Judgment and execution.] The judgment for the plaintiff is the same as in trespass; and the execution the same as in ordinary cases.

The judgment for the defendant, at common law, is, that he have a return of the goods, irreplevisable for ever, and his costs; and the execution may be by *fi. fa.* or *ca. sa.* for the costs, and by writ *de retorno habendo* for a return of the goods, and after that, if *nilil* or *elongata* be returned, *a capias in Witherman.*

The judgment for the defendant, under stat. 21 H. 8, c. 19, is, that the defendant have a return of the goods, and also his damages and costs; and the execution may be by *fi. fa.* or *ca. sa.* for the damages and costs, and by writ *de retorno habendo*, &c., for a return of the goods.

The judgment for the defendant, under stat. 17 C. 2, c. 7, is, that the defendant do recover the amount of the arrears of rent, or value of the goods, as found by the jury, and his costs; and the execution is by *fi. fa.* or *ca. sa.*

SECTION II.

Action for Distraining, where no Rent is Due.

The form of Action, and in what Cases.

At common law, if a landlord distrained for rent where no rent was due, the tenant's remedy was by action of trespass.

(a) 11 G. 2, c. 19, s. 22. See *Staniland v. Ludlam*, 4 B. & C. 889. *Gurney v. Buller*, 1 B. & A. 670. *Johnson v. Larson*, 2 Bing. 341.

But by stat. 2 W. & M. sess. 1, c. 5, (which first enabled a landlord to sell a distress taken for rent,) it is provided and enacted, by sect. 5, "that in case any such distress and sale as aforesaid shall be made by virtue or colour of this present Act, for rent pretended to be arrear and due, where in truth no rent is arrear or due to the person or persons distraining, or to him or them in whose name or names or right such distress shall be taken as aforesaid,—that then the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators, shall and may, by action of trespass or upon the case, to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double the value of the goods or chattels so distrained and sold, together with full costs of suit."

This statute extends only to cases where the goods distrained are sold; where the goods are not sold, the remedy is by the ordinary action of trespass, as at common law. And where the executors of a deceased tenant declared in trespass for taking and distraining divers goods and chattels (enumerating them) of the deceased, and detaining them until the deceased paid 9*l.* 13*s.*: *Ld. Denman, C. J.*, held that the plaintiffs could recover only the sum of 9*l.* 13*s.* (*b*).

The declaration in trespass is in the common and ordinary form. The following is the form of the declaration on the above stat. 2 W. & M. sess. 1, c. 5, s. 5.

Declaration on stat. 2 W. & M. sess. 1, c. 5, s. 5.

In the Queen's Bench.

The — day of —, A. D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the plaintiff, before and at the time of the committing of the grievance by the defendant as hereinafter mentioned, was tenant to the defendant of a certain messuage, farm, lands and premises, at and under a certain rent, therefor payable by the plaintiff to the defendant, to wit, the rent or sum of £—, per annum; yet the defendant, not regarding the statute in such case made and provided, heretofore, to wit, on —, wrongfully and injuriously seized, took and distrained in and upon the said tenements divers

goods and chattels of the plaintiff, of great value, to wit, of the value of £—, and afterwards, to wit, on the — day of —, sold the said goods and chattels as such distress as aforesaid, for certain rent, to wit, the sum of £—, then and there pretended by the defendant to be in arrear and due to him the said defendant, for the said demised tenements with the appurtenances; whereas, in truth and in fact, at the time of the making of the said distress, and of the said sale as aforesaid, no rent was in arrear or due to the said defendant, for or in respect of the said tenements with the appurtenances; contrary to the form of the statute in such case made and provided. And the plaintiff claims £—.

The action may be brought against the landlord, if it can be proved that he authorized the distress. Or it may be brought

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against the person who actually distrained. Or it may be brought against both.

General Issue.

In the Queen's Bench.

The — day of —, A. D. 18—.

J. S. }
ats. } The defendant, by C. D., his attorney, says that he is not guilty.
J. N. }

This plea should have the words "By statute" in the margin (*a*).

Evidence for Plaintiff.

To support this declaration, the plaintiff must prove,—

1. The tenancy, and at what rent, as stated in the declaration; a variance between the declaration and evidence in this respect would be fatal (*b*), unless the judge allow it to be amended.

2. That the defendant seized certain goods of the plaintiff upon the demised premises, as a distress for rent which he alleged to be due. And for this purpose, the notice of distress, if signed by him, may be put in and proved.

3. The value of the goods seized.

4. That the defendant caused them to be sold.

5. That at the time of the seizure and sale, no rent in fact was due for the demised premises.

Evidence for the Defendant.

This is not perhaps an action within stat. 11 G. 2, c. 19, s. 21 (*c*); and the defendant therefore not entitled to the privileges granted to landlords by that section. But I think it must be deemed an action for a penalty by the party grieved within stat. 21 Jac. 1, c. 4, s. 4, and that the defendant is entitled to give any special matter of defence in evidence under the general issue (*d*). The penalty given by stat. 11 G. 2, c. 19, s. 4, to the landlord, of double the value of goods fraudulently removed to avoid a distress, has been

(*a*) R. Pl. H. 1853, s. 21.

(*b*) See *Ireland v. Johnson*, 1 Bing. N. C. 162.

(*c*) *Ante*, p. 281.

(*d*) See 1 Arch. *Nisi Prius*, 2 Ed. p. 349.

holden to be within that section of the statute of James (e); and that is a case exactly analogous to this. Or the defendant may traverse the tenancy (f), or plead specially if he will.

SECTION III.

Action for distraining twice for the same Rent.

In what Cases.

At common law, a landlord could not distrain twice for the same rent: he could not distrain for a part at one time and a part at another, if there were sufficient goods upon the demised premises at the time of the first distress to have enabled him then to have distrained for the whole (g). And for this, the tenant may sue the landlord for damages, either in case or trespass, at his option (h). If indeed the tenant replevy the goods, and bring replevin, it will not be sufficient in a plea in bar to an avowry for the rent, to say that the defendant on a former occasion took goods enough to discharge the rent in arrear, and the costs of the distress, and might thereby have paid the same, but neglected to do so, and wrongfully made a second distress for the same cause; such a plea was holden ill on demurrer, assigning for cause that it did not show that the rent was satisfied by the former distress (i). So, if a landlord, having distrained goods sufficient to pay his rent, abandon that distress, and afterwards make a second distress for the same rent, the tenant may sue him for damages in an action on the case; or, it should seem, trespass would lie (k). But if, where he distrains for a part only, there were not goods or cattle sufficient upon the premises to answer the whole of the rent, he may lawfully come a second time to distrain for the residue (m). So, if cattle to the full amount were distrained on the first day, and afterwards one of the beasts died in the pound, the distrainer may again distrain another, or other goods, in lieu of it (l). So, if from mistake, or from ignorance of the value of the goods, he took too little upon the

(e) *Jones v. Williams*, 4 Mees. & W. 375.

(f) *Fates v. Tearle et al.*, 13 Law J. 289, qb.

(g) Anon. Moor. 7 pl. 26; Anon. Cro. El. 13; Anon. 3 Salk. 137; *Wally v. Savil*, 2 Lutw. 1532, 1536; Bro. Abr. Distress, 98.

(h) *Lear v. Caldicoth*, 4 Q. B. 123.

(i) *Hudd v. Ravenor*, 2 Brod. & B. 602. *Lingham v. Warren*, Id. 36.

(k) *Smith v. Goodwin*, 4 B. & Ad. 413. *Dareson v. Cropp*, 14 Law J. 281, cp.

(l) Bro. Abr. Distress, 96.

(m) Bro. Abr. Distress, 22; per Hobart, C. J., Hob. 61; per Holt, C. J., Anon, 12 Mod. 307.

first occasion, he may distrain again for the residue (*z*). So, by stat. 17 C. 2, c. 7, (which enabled a defendant, in replevin, instead of taking a judgment *de retorno habendo*, as at common law, to take a verdict for the amount of his rent, if that were less than the value of the goods, or for the value of the goods, if that were less than the rent,) it is enacted by sect. 4, "that in all cases aforesaid, where the value of the cattle, distrained as aforesaid, shall not be found to be to the full value of the arrears distrained for, the party to whom such arrears were due, his executors or administrators, may from time to time distrain again for the residue of the said arrears." The words "from time to time" here, however, will not enable the landlord to distrain for the residue at several times, if there be sufficient goods upon the premises at first whereon to distrain for the full amount; but merely, if there be not sufficient the first time, he may come a second, and if there be not sufficient at the second time, he may come a third time, and so on. And it seems doubtful whether the statute extends at all to a case where, upon the occasion of the original distress, the defendant might have distrained for the full amount, but purposely abstained from doing so.

Also, where a tenant gave a bill of sale to his debtor, under which the goods, &c., (including certain eatage,) were about to be sold, when the landlord distrained for rent then due to him; it was thereupon agreed that the sale should proceed, but that the landlord should be paid his rent out of the produce; the goods and eatage were accordingly sold, but did not produce sufficient to satisfy the distress; and the person who purchased the eatage, having put in his cattle to depasture it, the landlord distrained upon them for the residue of his rent: it was holden (*a*) that the owner of these cattle might maintain an action of trespass against the landlord for distraining them, as under the circumstances a contract was to be implied upon his part, not to distrain the cattle of the purchaser of the eatage (*b*).

Also, if rents due at several days be in arrear, there is no objection to the landlord distraining for the rent due at one day, and afterwards for the rent due at another day, although there were goods upon the premises on the first occasion sufficient for both rents (*c*).

Also, if a widow be endowed of lands let at an entire rent, she may distrain for a third of the rent, and the heir for the remaining two-thirds (*d*). So, where lands let at an entire rent, descend to parceners, each may distrain for her moiety (*e*).

(*z*) *Wallis v. Savil*, 2 Lutw. 1532; *Hutchins v. Chambers*, 1 Burr. 589.

(*a*) Parke, B., dis.

(*b*) *Horsford v. Webster et al.*, 1 Cr. M. & R. 696.

(*c*) Per Brown, J., Anon. Moor, 7 pl. 26.

(*d*) Bro. Abr. Avowry, 139.

(*e*) Bro. Abr. Distress, 59.

It has been already mentioned (*supra*), that the tenant, in this case, may maintain either trespass or case, at his option : if trespass, the declaration may be in the ordinary form of the count in trespass *de bonis asportatis* (f); if an action on the case, the declaration may be as follows :—

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that heretofore and before the committing of the grievances hereinafter mentioned, to wit, on —, the defendant took and distrained certain growing crops, goods and chattels of the plaintiff, to wit, —, under colour, and as and for and in the name of a distress for certain rent then alleged to be due and payable to the defendant for and in respect of certain premises then in the possession of the plaintiff, and which said growing crops then and afterwards were of more than sufficient value to have satisfied the said alleged arrears of rent, and the costs, expenses and charges of and attending such distress, and the sale of the said growing crops, goods and chattels under such distress, and incidental thereto; and the defendant, having so taken and distrained the said growing crops, goods and chattels of the plaintiff as aforesaid, then had and retained possession of the same under such distress, for a long space of time, to wit, from the day and year last aforesaid, until

and upon a certain other day, to wit, the —; and although the defendant, under the said distress, and by virtue thereof, could and might have satisfied the said arrears of rent and all reasonable and lawful charges in that behalf, yet the defendant, well knowing the premises, afterwards, to wit, on —, wrongfully, injuriously and vexatiously made a second and another distress upon the said growing crops, goods and chattels, to wit, —, of the plaintiff, for the same identical alleged arrears of rent for and in respect whereof the said distress in this count first above mentioned was made as aforesaid, and then again took and distrained the said growing crops, goods and chattels of the plaintiff for the same rent so pretended to be due and payable as aforesaid, and not for any more or other or different rent or cause whatsoever, and wrongfully and injuriously kept and withheld the said several growing crops, goods and chattels from the plaintiff, under the said second distress in this count mentioned for a long space of time, to wit, from the day and year last aforesaid, hitherto [or until —]. And the plaintiff claims £—.

This count was holden good in *Lear v. Caldicott* (g). The statement may easily be varied, so as to describe the matter of complaint in any similar case.

Pleadings and Evidence.

The general issue is the same as the form, *ante*, p. 290. Under this, the plaintiff will have to prove the two distresses,

(f) See 1 Arch. *Nisi Prus*, 2d. Ed. p. 476.

(g) 4 Q. B. 123; 12 Law J. 109, qb.

See also *Smith v. Goodwin et al.*, 4 B. & Ad. 413.

and that they were for the same rent; and he must give evidence to connect the defendant with them.

The defendant may give evidence in disproof of what the plaintiff ought to prove, as above mentioned; or he may give in evidence any matter of defence, which confesses and avoids the cause of action, without specially pleading it (*h*).

SECTION IV.

Action for distraining for more Rent than was due.

In what Cases.

If a landlord distrain upon his tenant for more rent than is due at the time, the tenant may maintain an action on the case against him, to recover damages. Even where the distress was for 25*l.* the amount of half a year's rent, then due, but the sum really payable to the landlord was very much less, being reduced to 5*l.* 10*s.* by payments of rent to the head landlord, and of land tax; and although the tenant tendered the receipts for the sums as paid by him, and the balance in money, yet the landlord refused them, and distrained for the whole rent: the court held that he was liable to this action, at the suit of his tenant (*i*). But he is not liable to this action, where the goods actually distrained are of a less value than the amount of the rent actually due (*k*). This was decided otherwise in the case of *Taylor v. Henniker* (*l*), which, however, has since been overruled. The case was thus:—The defendant claimed 165*l.* as due to him for rent, and distrained a crop of hay grass, then growing, for the amount; 80*l.* was all that was due; and the defendant having mowed the crop (which was of less value than the 80*l.*), and laid it up upon the premises, then served the tenant with a fresh notice of distress for the 80*l.* only: it was argued that as the goods actually distrained were of less value than the rent really due, the landlord was not liable to this action at the suit of his tenant, for distraining nominally for more; and *Wilkinson v. Terry* (*m*), and *Avenell v. Croker* (*n*), where it had been so decided at *nisi prius*, were cited: but the court held that the action well lay for distraining for more than was due, without reference at

(*h*) See 11 G. 2, c. 19, s. 21; *ante*, p. 281.

(*i*) *Carter v. Carter et al.*, 5 Bing. 406.

(*k*) *Tancred v. Leyland*, 20 Law J. 316, qb.

(*l*) 12 Ad. & El. 488, overruling *Wilkinson v. Terry*, and *Avenell v. Croker*, *supra*. *Crowder v. Self*, 2 Moody & R. 190.

(*m*) 1 Moody & R. 377.

(*n*) Moody & M. 172.

all to the value of the goods taken; the action lay at common law, before the stat. 2 W. & M. sess. 1, c. 5, allowed of the sale of the distress, and when the value of the goods seized was not material; and the relinquishment of the excessive sum distrained for, by notice to the tenant, did not cure the wrong, any more than the return of an article converted cures the conversion. This case of *Taylor v. Henniker* was overruled in the late case of *Tancred v. Leyland (o)*, in the Exchequer Chamber, upon error from the court of Queen's Bench.

Declaration.

In the Queen's Bench.

The — day of —, A.D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the plaintiff, before and at the time of the committing of the grievance hereinafter next mentioned, was tenant to the defendant of certain premises, at and under a certain rent: Yet the defendant, heretofore, to wit, on —, falsely pretending that a certain large sum of money, to wit, the sum of £— was then due, and in arrear, from the plaintiff to the defendant, for rent of the said premises, wrongfully and unjustly seized and took certain cattle, to wit, —, of the said A. B., then found and being in and upon the said last-mentioned premises, of greater value than the amount of the rent so distrained for, to wit, of the value of £—, as a distress for the said sum of money so pretended to be due and in arrear as aforesaid, and under that pretence

[then sold the same, and converted the same to his own use. Or] kept and detained the said cattle of the plaintiff from him the said plaintiff, for a long space of time, to wit, for the space of — days then next following, and until he the said plaintiff, in order to regain the possession of his said cattle, was forced and obliged to pay, and did pay to the defendant the said pretended arrears of rent, and a large sum of money, to wit, the sum of £— for the costs and charges of the said distress and expenses incidental thereto. Whereas in truth and in fact, at the time of the making of the said distress as aforesaid, and during all the time aforesaid, a small part only, to wit, the sum of £— of the said sum of money so pretended to be due and in arrear as aforesaid, was due and in arrear from the plaintiff to the defendant for the rent of the said tenements with the appurtenances. And the plaintiff claims £—.

General Issue and Evidence.

The general issue is the same as the form *ante*, p. 290. The plaintiff must prove,—

1. The amount of the rent which was really due, by putting in and proving the last receipts, or the like; and a variance between the sum proved and that stated in the declaration will not be material (p).

2. The distress, and the amount distrained for, by putting in and proving the notice of distress, and connecting the de-

(o) 30 Law J. 316, qb.

(p) *Sells v. Hoare et al.*, 1 Bing. 401.

fendant with it, when necessary. Where the landlord's broker went to the demised premises, and pressed for payment of rent alleged to be due, and 3*l.* 3*s.* for expenses of the levy, but touched nothing, and made no inventory; the tenant paid the rent and expenses, upon which the broker withdrew; and the tenant then brought his action against the landlord, for distraining for more than was due: it was holden that the defendant, under these circumstances, could not deny that there had been an actual distress (*b*).

The defendant may give evidence in disproof of what the plaintiff has proved; even where a former rent had been distrained for, and satisfied, it was holden that the landlord was not precluded by that circumstance from proving that rent accruing due before that distrained for was still owing (*c*). The defendant, also, under this plea, may give in evidence any defence which confesses and avoids the cause of action, although he have not pleaded it specially (*d*). But it will be no defence to prove, that although the distress was nominally for more, the value of the goods distrained was less than the rent actually due (*e*). Nor will it be any defence, that the defendant, before any sale of the goods, rectified the mistake in the first notice of distress, by giving a second, which was correct (*f*).

SECTION V.

Action for an Excessive Distress.

In what Cases.

By the stat. of Marlebridge (*g*), "distresses shall be reasonable distresses, and not too great; and they that take unreasonable and undue distresses, shall be grievously amerced for the excess of such distresses." But besides this amercement, of which there are instances in the old books (*h*), an action on the case, founded on the above enactment, lies at the suit of the party grieved. It seems that formerly the amercement formed part of the judgment in the action; for where an information at the suit of the crown was brought against a lord of a manor, for taking excessive distresses, it was holden by the court that

(*b*) *Hutchins v. Scott*, 2 Mees. & W. 809.

(*c*) *Gambrell v. Earl of Falmouth et al.*, 4 Ad. & El. 73.

(*d*) See stat. 11 G. 2, c. 19, s. 21, ante, p. 281.

(*e*) *Taylor v. Henniker*, 12 Ad. & El. 488, ante, p. 294.

(*f*) Id.

(*g*) 52 Hen. 3, c. 4.

(*h*) See 41 E. 3, 26. Bro. Abr. Distress, 2.

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it did not lie, the judgment upon the information being for a fine, not for an amercement; the remedy was by action on the case, founded on the statute of Marlebridge, and not by information (*i*). The remedy for the party grieved, therefore, is by action on the case founded on this statute (*k*), and not trover (*l*), or trespass (*m*). Case will lie, even although the rent have been tendered before the making of the distress, and there have been no subsequent demand of it (*n*).

It remains to be considered what is an excessive distress. The cases which we find in the old books, decided at a time when the distress could not be sold, and was holden merely as a pledge for the rent,—need hardly be mentioned as authorities at present: as for instance, that 40 sheep taken as a distress for twopence, or 16 oxen for ninepence, is excessive (*o*); two oxen as a distress for four pair of gloves, ten sheep for one pair, ten for another, is excessive (*p*); and no doubt they would be so. But now that the distress may be sold, the sum for which it would sell suggests the rule; and if a landlord now seize cattle, or goods and chattels, to an unreasonable amount beyond what would realize the rent and expenses at a sale, such as is usually adopted for the sale of a distress, the distress will be deemed excessive (*q*). But the seizing of an ox or a horse as a distress for a penny is not excessive, if there be no other distress upon the premises; it would be otherwise, however, if there were a sheep or a swine, or any beast, &c., of less value, upon the premises; then the taking of the horse would be an excessive distress (*r*). And the mere seizure of the distress, and leaving a person in possession, subjects the distrainer to this action, although the goods be not removed, and the tenant be not thereby prevented from carrying on his business (*s*). So, if a landlord distrain upon the crops growing in two fields, where the crops growing in one, when at maturity, would be abundantly sufficient to pay the rent and expenses,—this would be an excessive distress (*t*); for in whatever stage the crop may be at the time of the distress, it is easy to calculate the price it probably will sell for when at maturity and harvested (*u*). If part only of the goods seized belong to the tenant, part to a

(*i*) *R. v. Lesingham*, Lev. 220.
9 Vin. Abr. Distress, R. 2, pl. 2.

(*k*) *Hutchins v. Chambers*, 1 Burr. 689.

(*l*) *Whitworth v. Smith*, 1 Moody & R. 193.

(*m*) *Lyne v. Moody*, 9 Vin. Abr. Distress, R. 2, pl. 3.

(*n*) *Brancomb v. Bridges*, 1 B. & C. 143.

(*o*) 41 E. 3, 20.

(*p*) 8 H. 4, 15. 9 Vin. Abr. Distress, R. pl. 2.

(*q*) *Wells v. Moody*, 7 Car. & P. 59.

(*r*) 2 Inst. 107.

(*s*) *Baylis v. Fisher*, 7 Bing. 153.

(*t*) *Piggott v. Birtles*, 1 Mees. & W. 441.

(*u*) See *Roden v. Eyton*, post, p. 290.

stranger, the tenant may still recover, framing his declaration accordingly (v).

The Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—.

Middlesex to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the plaintiff, before and at the time of the committing of the grievance hereinafter next mentioned was tenant to the defendant of certain lands and premises, at and under a certain rent therefor payable by the plaintiff to the defendant for the same, of which said rent, at the time of the committing of the grievance hereinafter next mentioned, a small sum of money, to wit, the sum of £—, and no more, was due and in arrear from the plaintiff to the defendant: Yet the defendant, not regarding the statute in such case made and provided, here-

tofore, to wit, on —, wrongfully and maliciously took and distrained for the said arrears of rent certain goods and chattels, to wit, — of the plaintiff, of much greater value than the amount of the said arrears of rent, to wit, of the value of £—, and thereby took an excessive and unreasonable distress for the said arrears of rent; when, at the time of the taking of the said distress as aforesaid, a certain part of the said goods and chattels so distrained as aforesaid, to wit, one half thereof, then was of sufficient value to have satisfied the said arrears of rent, and the charges of the said distress, and of the appraisal and sale thereof; contrary to the form of the statute in such case made and provided. And the plaintiff claims £—.

A count in trover is often added, in order that the plaintiff may avail himself of it, in case the tenancy or the distress should be denied; or in case it turn out at the trial that some goods were taken away, which are not in the inventory (w). So, where a count in trover is added, it is competent for the plaintiff, at the trial, to abandon the above count in case, and, denying the tenancy, recover under the count in trover, without giving any previous intimation to the defendant of his intention to take that course (x). If the goods have been sold, add a count for not selling at the best price (y).

General Issue, and Evidence for Plaintiff.

The general issue is the same as the form *ante*, p. 290. Under this, if there be no other plea, the plaintiff must prove,—

1. The tenancy, as stated in the declaration; and if there be a variance between the proof and the statement in the declaration,—

(v) *Bail v. Mellor*, 19 Law. J., 279, ex.

(w) *Bishop v. Bryant*, 6 Car. & P. 484.

(x) *Spargo v. Brown*, 9 B. & C. 935.

(y) *Vide post*, p. 312.

ration, in this respect, it will be fatal (z), if the judge will not amend.

2. The amount of rent due at the time of the distress, by putting in and proving the last receipt, or the like; but a variance between the proof and declaration, in this respect, will not be material (a).

3. The distress, by producing and proving the notice of distress, and connecting the defendant with it, if necessary.

4. The goods distrained, their fair value, and the sum they would fairly sell for, at such a sale as goods taken under a distress are usually sold at (b). Also where the distress has been upon a farm, and consists of straw, &c., which, either by the express stipulation between the landlord and tenant, or by the custom of the country, must be expended upon the farm, it seems doubtful whether the great disadvantage at which it would be likely to sell under such circumstances must not also be taken into calculation (c). But where, under a distress for 39*l.*, the landlord seized a rick of corn of the value of 62*l.* there being two other ricks of less value on the premises, and the tenant being bound to consume the straw upon the premises, the landlord sold the rick for 42*l.*, subject to the purchaser's leaving the straw: this was holden not to be an excessive distress, as the landlord was not bound to sell the straw (d). It is not necessary, however, to prove express malice (e); nor is it a question to be left to the jury, whether the defendant acted maliciously (f).

Evidence for Defendant.

Where the general issue "by statute" is pleaded, the defendant may not only controvert all the plaintiff has proved,—the tenancy, the ownership of the goods (g), the distress, and the value of the goods distrained,—but he may also give in evidence any matter which, in ordinary cases, he must have specially pleaded (h). But if the general issue be pleaded, but not "by statute," as that merely puts in issue the excessive distress, the defendant may also traverse the tenancy, if he will (i). But an arrangement between the parties, respect-

(z) See *Ireland v. Johnson*, 1 Bing. N. C. 162.

(a) See *Sells v. Hoare et al.*, 1 Bing. 401.

(b) *Wells v. Moody*, 7 Car. & P. 59.

(c) See *Abbey v. Petck*, 8 Mees. & W. 419; but see *Frusher v. Lec*, 10 Id., 709.

(d) *Roden v. Eyton*, 18 Law J., 1, cp.

(e) *Field v. Mitchell*, 6 Esp., 71.

(f) See *Sturch v. Clark et al.*, 4 B. & Ad. 113.

(g) *Williams v. Jones et al.*, 11 Ad. & El. 643.

(h) See 11 G. 2, c. 10, s. 21, *ante*, p. 281.

(i) *Yates v. Tearle et al.*, 13 Law J., 289, qb.

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ing the sale of the goods distrained, made after the distress and before the sale, does not furnish the defendant with a defence, or divest the plaintiff of his right of action ; for a right of action once vested can only be discharged by a release under seal, or by the acceptance of something in satisfaction of the wrong done (*y*). So where, upon a distress being made, the tenant signed an agreement, drawn up by the broker, that if he did not pay the rent on or before a given day, the broker might again enter and distrain : this was holden to be no defence to an action for an excessive distress, subsequently made in consequence of the tenant's not paying the rent at the stipulated time (*z*).

Verdict.

Upon a declaration merely for an excessive distress, where no mention is made of a sale, either by way of special damage, or of substantive complaint, the plaintiff can recover damages merely in respect of the detention of the goods, and not of the sale of them (*a*). And in the case of seizing growing crops, the measure of damages is, not the value of the crops, but the inconvenience and expense which the tenant has sustained in being deprived of the management of them, or which he was put to by being obliged to procure sureties to a larger amount than he would otherwise have to do in replevying the distress (*b*). If the removal be stated as special damage, the plaintiff will be entitled to damages for any injury or inconvenience he may have sustained from it. And if the sale be alleged as special damage, the plaintiff will be entitled to the fair value of the articles composing the excess.

SECTION VI.

Action for Distraining Beasts of the Plough or Sheep.

By stat. 51 H. 3, st. 4, it is amongst other things enacted, that no man shall be distrained by his beasts that gain his land, nor by his sheep, so long as the distrainor can find another distress or chattels sufficient for the demand. The statute, in this respect, is said to be confirmatory of the common law (*c*).

(*y*) *Willoughby v. Backhouse*, 2 B. & C. 821.

(*z*) *Holland v. Bird*, 10 Bing. 15.

(*a*) *Thompson v. Wood et al.*, 4 Q. B. 493 ; 12 Law J., 175, qb.

(*b*) *Piggott v. Birtles*, 1 Mees. & W. 441.

(*c*) 2 Inst. 132 ; and see Co. Lit. 47. a. Dy. 312 in marg. Per Grose, J., 4 T. R. 569.

Declaration.

In the Queen's Bench.

The — day of —, A.D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the defendant, on —, took and distrained the beasts of the plough, to wit, [four oxen and four horses] of the plaintiff, then being in and upon certain land and premises of the plaintiff, and whereby and wherewith he the said plaintiff then tilled his said land, not for damage feasant, but for certain rent, to wit, the sum of £—, then supposed to be due and owing from the plaintiff to the

defendant, for and in respect of the said land and premises, although there were then other goods and chattels of the plaintiff in and upon the said land and premises, not being beasts of the plough or sheep, sufficient for a reasonable distress for the rent aforesaid; and the defendant afterwards, to wit, on the day and year aforesaid, sold the said beasts of the plough, and converted and disposed of the money arising from the sale thereof, to the use of him the defendant: contrary to the form of the statute in such case made and provided. And the plaintiff claims £ —.

General Issue and Evidence.

The general issue is the same as the form *ante*, p. 290. The plaintiff must prove the distress, as directed in the last section;—that the cattle seized were beasts of the plough, or sheep, his property, as described in the declaration;—that at the time there were other distrainable goods upon the premises, sufficient to satisfy the rent and expenses;—the sale;—and the value of the cattle.

The defendant, under this plea of not guilty "by statute," may disprove what the plaintiff has proved, and may give in evidence any matter which, in ordinary cases, must have been specially pleaded (*d*).

SECTION VII.

Action for distraining Property not distrainable.

In what Cases.

Fixtures.] Things fixed to the freehold cannot legally be distrained (*e*): and therefore it has been holden that fixtures, such as kitchen ranges, stoves, coppers, grates, &c., cannot be distrained for rent, although they be tenant's fixtures, and the tenant may remove them (*f*). So, trees growing cannot be distrained, although they be growing in a nurseryman's

(*d*) See 11 G. 2, c. 10, s. 21, *ante*, 515, per Willes, C. J.; and see *Niblet v. Smith*, 4 T. R. 504.

(*e*) *Simpson v. Hartopp*, Willes, (*f*) *Darby v. Harris et al.*, 1 Q. B. 895. 10 Law J., 294, qb.

ground, and be removable by him at pleasure (*g*). So, a beer-engine in a public-house, an anvil in a smith's shop, or a mill-stone in a corn mill, cannot be distrained, because they are fixed to the freehold (*h*).

Implements of trade.] Implements of the tenant's trade cannot be distrained if they be in actual use at the time (*i*), or if there be other sufficient distress upon the premises (*k*); but otherwise they may. Therefore it has been holden that looms lent to a weaver by his employer, to work with, were distrainable for rent due from the weaver, there being no other sufficient distress upon the premises, and it not appearing that they were in use at the time (*l*). So, where a threshing-machine was distrained on a Monday, and it appeared that it had been let to hire to the tenant for a job that was completed on the Saturday preceding, and there did not appear to be any other distress upon the premises: the court held that the landlord was warranted in distraining it, saying that implements of trade are distrainable, if they be not in use at the time, and there be no other distress upon the premises (*m*). So, where a beer-machine in a public-house, which was affixed to the freehold, was distrained, and was forcibly detached from the premises, and removed: it was holden that the landlord had no authority at all, or under any circumstances, to distrain it, whether in use or not, or whether there were other distress upon the premises or not, as it was fixed to the freehold (*n*). And the same as to the anvil in a smith's shop, or the mill-stone in a corn or flour mill (*o*).

Goods on the premises, in the way of trade.] Goods not belonging to the tenant, which may happen to be upon the demised premises for the purposes of trade, cannot be distrained:—such as materials delivered to a weaver to weave (*p*); goods in possession of a factor for sale (*q*), or in the warehouse of a wharfinger (*r*), or granary keeper (*s*), for safe keeping; goods deposited on the premises of an auctioneer for sale (*t*);

(*g*) *Clark v. Calvert*, 3 Moore, 96; *Clark v. Gasgarth*, 8 Taunt. 431.

(*h*) *Vide infra*.

(*i*) Per *Ld. Kenyon*, C. J., 4 T. R. 567.

(*k*) *Gorton et al. v. Falkner*, 4 T. R. 565. *Harvey v. Pocock et al.*, 11 Mees. & W. 740.

(*l*) *Gorton v. Falkner*, *supra*.

(*m*) *Fenton v. Logan*, 9 Bing. 676.

(*n*) *Dalton v. Whittem et al.*, 12 Law J., 55, qb.

(*o*) Per *Ld. Kenyon*, 4 T. R. 567.

(*p*) *Wood v. Clarke*, 1 Cr. & J. 484. *Gibson v. Ireson et al.*, 3 Q. B. 39.

(*q*) *Gilman v. Elton*, 3 Brod. & B. 75.

(*r*) *Thompson v. Mashiter*, 1 Bing. 383.

(*s*) *Mathias v. Mesnard*, 2 Car. & P. 353.

(*t*) *Adams v. Grane*, 1 Cr. & M. 380.

goods brought to a weighing-machine to weigh (*u*); goods given to a carrier to carry (*v*); a bullock sent to 'a' butcher's to be slaughtered (*w*); a horse in a smith's shop to be shod (*x*); or sacks of corn in a mill to be ground (*y*), and the like. But machinery upon the premises, not fixed to the freehold, is not exempted from distress, although merely lent to the tenant on hire; unless it be in use at the time, or there be no other distress upon the premises (*z*). Nor is a carriage, standing at livery, privileged from being distrained upon (*a*); or horses in a stable, which has been let by the tenant to an innkeeper during races (*b*).

Other matters.] Wearing apparel, if in actual use at the time, cannot be distrained for rent; but if not in actual use, it may (*c*).

As to beasts of the plough and sheep, see the last section.

Remedy for wrongfully taking them.] As a landlord cannot justify taking by way of a distress things which are not distrainable, the tenant or person from whose possession they are taken, or the owner, having a right to the immediate possession, may maintain either trover or trespass against the party distraining, or the landlord if he can be connected with the distress, or both. Trespass is the ordinary form of action adopted, where things fixed to the freehold have been taken; but trover may be brought, although in that form of action the things alleged to have been converted are necessarily treated as goods and chattels (*d*). So replevin will lie, if the things have been severed (*e*). So trespass or trover will lie for taking implements of trade in use, or where other sufficient distress is upon the premises (*f*), and indeed in all the above cases; for with respect to such things the landlord or distrainer is a trespasser, *ab initio*.

The declaration in trover or trespass, is the same as in ordinary cases (*g*).

If the things have been removed and sold, the plaintiff will be entitled to their value, and the damage he has sustained by their removal. But if they have not been removed, but the tenant has paid the rent and expenses, to prevent their

(*u*) Cro. El. 549; 3 Lev. 261.

(*v*) Balk. 249, 250.

(*w*) *Brown v. Shevill*, 2 Ad. & El. 138.

(*x*) 3 Bac. Abr. Distress, B.

(*y*) Id.

(*z*) *Fenton v. Logan*, 9 Bing. 676, *supra*.

(*a*) *Francis v. Wyatt*, 3 Burr. 1498; 1 W. Bl. 423.

(*b*) *Crosier v. Tomkinson*, 2 Ld. Kenyon, 439.

(*c*) *Bissett v. Coldreell*, Peake, 36. *Baynes v. Smith*, 1 Esp. 206.

(*d*) *Dalton v. Whittam et al.*, 12 Law J. 55, qb.

(*e*) See *Niblet v. Smith*, 4 T. R. 504.

(*f*) *Harvey v. Pocock et al.*, 11 Mees. & W. 740.

(*g*) See 1 Arch. Nisi Prius, 2nd. Ed. p. 605, 476.

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removal, he will then be entitled, not to the value of the things, but merely to the actual damage sustained by the seizure, &c. (z).

SECTION VIII.

Action for Distraining, after Tender of the Rent.

At any time before the distress, or before the cattle or goods distrained are impounded, but not afterwards, the tenant may tender the amount of the rent due (a); and if the landlord distrain or impound the distress after such tender, without a subsequent demand and refusal of the rent, the tenant may have his remedy by action of trespass (b); or he may lawfully rescue the distress (c).

The declaration is in the ordinary form of trespass. Or, it seems, it may be framed in case (d). Proof of a tender of the rent to the landlord will be sufficient, although, in refusing it, he merely said that he had left the matter in the hands of the bailiff who made the distress, and referred the party to him (e).

SECTION IX.

Action for refusing to restore Goods distrained, on Tender of the Rent.

A tender of the rent before distress makes the distress tortious; a tender after the distress, and before impounding, makes a subsequent detention, and not the taking, wrongful; but a tender after the impounding, makes neither the one nor the other unlawful, for the tender is then too late (f). And it is not necessary, in this respect, that the impounding should be in a public pound; if the goods be impounded on the premises, a tender afterwards will be ineffectual (g). Where a bailiff, in order to make a distress for rent, went into a field where the cattle were, and putting his hand on the side of one of them, said he made a distress for rent; he then made a list of the cattle upon paper; but he made no change whatever in the situation of the cattle, nor did he put any additional lock

(z) *Harvey v. Pocock et al.*, supra.

(a) *Thomas v. Harris et al.*, 1 Man. & Gr. 695, 9 Law J. 308, cp. *Ellis v. Taylor et al.*, 10 Law J. 462, ex.

(b) See the *Six Carpenters' case*, 8 Co. 147 a.

(c) Co. Lit. 160 b.

(d) *Smith v. Goodwin et al.*, 4 B. & Ad. 413. *Branscomb v. Bridges et al.*, 1 B. & C. 145.

(e) Id.

(f) *Six Carpenters' case*, 8 Co. 147 a, 2 Inst. 107. *Ladd v. Thomas*, 4 Per. & D. 9.

(g) *Ellis v. Taylor et al.*, 10 Law J. 462, cp.

or fastening upon the gate ; on the same day he gave notice of distress, which notice also mentioned that the cattle were impounded on the premises, but did not state where ; the bailiff remained in possession until the next day, when he was succeeded by another person, and on the third day the tenant made a tender of the rent, and an offer to pay a certain sum for costs, which were refused : it was holden (*h*) that the impounding of the cattle was complete and perfect from the time of giving the notice to the tenant, and that a tender of the rent and expenses after that was too late (*i*). So, where goods were distrained for rent, and remained impounded on the premises, in the possession of the bailiff, at the request of the tenant ; and in some days afterwards the tenant tendered the rent and costs, which were refused : the court held that no action would lie for this, the tender being after the impounding (*k*). And in the case of growing crops distrained,—if at any time after they are distrained, and before they shall be ripe, and cut, cured or gathered, the tenant or lessee, his or her executors, administrators or assigns, shall pay or cause to be paid to the lessor or landlord, for whom such distress shall be taken, or to the steward or other person usually employed to receive the rent of such lessor or landlord, the whole rent which shall then be in arrear, together with the full costs and charges of making such distress, and which shall have been occasioned thereby,—that then, upon such payment, or lawful tender thereof actually made, whereby the end of such distress will be fully answered, the same and every part thereof shall cease ; and the corn, grass, hops, roots, fruits, pulse or other product, so distrained, shall be delivered up to the lessee or tenant, his or her executors, administrators or assigns (*l*).

Where the tender is made before the impounding, or in the case of growing crops, before they are ripe, cut, cured and gathered, and the landlord refuses the tender, and afterwards removes or sells, or even detains, the distress,—the tenant may have his remedy, either by action of trespass (*m*), or action on the case (*n*). If trespass be adopted, the declaration will be in the ordinary form in trespass. If the plaintiff declare in case, the following may be the form of the declaration.

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—. Middlesex, to wit : A. B., the plaintiff in this suit, by E. F., his

attorney, sues C. D., the defendant in this suit: For that the defendant heretofore, to wit, on —, had taken and distrained divers goods

(*h*) *Dia, Maule, J.*

(*i*) *Thomas v. Harris et al.*, 1 Man. & Gr. 695 ; 9 Law J. 306 cp.

(*k*) *Ellis v. Taylor et al.*, 8 Mees. & W. 415 ; 10 Law J., 402, ex.

(*l*) 11 G. 2, c. 19, s. 9.

(*m*) *Vertue v. Beasley et al.*, 1 Moody & R. 21.

(*n*) See *Branscomb v. Bridges et al.*, 1 B. & C. 145.

and chattels of the plaintiff, of great value, to wit, of the value of £—, as and for and in the name of a distress for certain rent, to wit, the sum of £—, then due and in arrear from the plaintiff to the defendant, for and in respect of a certain messuage before then held and occupied by the plaintiff as tenant thereof to the defendant; and thereupon afterwards and whilst the defendant was in possession of the said last-mentioned goods and chattels, under such distress as aforesaid, and before the same or any part thereof were or was impounded, to wit, on the day and year aforesaid, the plaintiff tendered and offered to the defendant, in satisfaction and discharge of the said arrears of rent, and the costs and charges of the said distress, a certain large sum of money, to wit, the sum of £—, the same being then and there a sufficient sum to satisfy and dis-

charge the said arrears of rent, together with all the costs and charges of the said distress, and then and there requested the defendant to re-deliver and restore the said goods and chattels to him the said plaintiff; yet the defendant did not, nor would, when he was so requested as aforesaid, or at any other time, accept or receive the said sum of money from the plaintiff in satisfaction and discharge of the said arrears of rent, and the costs and charges of the said last mentioned distress, or re-deliver or restore the said goods and chattels, or any part thereof, to the plaintiff, but then wholly neglected and refused so to do, and had hitherto wrongfully and injuriously kept and withheld the said last-mentioned goods and chattels from the plaintiff, and had converted and disposed thereof to his own use. And the plaintiff claims £—.

General Issue and Evidence.

The general issue is the same as the form *ante*, p. 290. The plaintiff will have to prove the distress, the tender before impounding, the refusal, and the conversion if any. Proof of a tender of the rent, and of a sufficient sum to answer costs, to the landlord, will be sufficient, although the distress were made by his agent (*o*).

The defendant may disprove anything which the plaintiff was bound to prove; he may prove that the goods were impounded before the tender (*p*); or he may give in evidence any defence which confesses and avoids the cause of action stated (*q*).

SECTION X.

Action for driving a Distress out of the Hundred, &c.

In what cases.

By stat. 1 & 2 Ph. & M. c. 12, s. 1, "no distress of cattle shall be driven out of the hundred, rape, wapentake or lathe where such distriss is or shall be taken, except that it be to a pound overt within the same shire, not above three miles

(*o*) *Smith v. Goodwin et al.*, 4 B. & Ad. 413.

(*p*) See *ante*, pp. 304, 305.

(*q*) See 11 G. 2, c. 19, s. 21, *ante*, p. 281.

distant from the place where the distress is taken ;"—“ upon pain every person offending contrary to this Act, shall forfeit to the party grieved, for every such offence, an hundred shillings, and treble damages ” (r). Also, by stat. 52 H. 3, c. 4, “ none shall cause any distress to be driven out of the country.”

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—.

Middlesex to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the defendant, heretofore, to wit, on —, in the hundred of —, in the county of —, took and distrained divers cattle, to wit, —, of the plaintiff, of great value, to wit, of the value of £—, as and for and in the name of a distress for certain rent; and the defendant, not regarding the statute in such case made and provided, afterwards, to wit, on the same day and

year last aforesaid, drove the said last mentioned distress out of the said hundred, in which the same was so taken as aforesaid, into a certain other hundred, to wit, the hundred of —, in the county aforesaid, and to a certain place there [not being a pound overt in the same shire, “or” being above three miles, to wit, twelve miles distant from the place where the same was so taken as aforesaid, that is to say, to —; in contempt of our said lady the queen and her laws, and against the form of the statute in such case made and provided. And the plaintiff claims £—.

Although this action is partly for a sum certain, namely, for the 100 shillings, yet as it is also for unliquidated damages, it is properly an action on the case, and not an action of debt.

General Issue and Evidence.

The general issue is the same as the form *ante*, p. 290. The plaintiff will have to prove—

1. The distress, and within what hundred it was made.
2. That it was driven into another hundred, to a place more than three miles from that in which the distress was taken, or not being a pound overt within the same county, according as it is stated in the declaration.
3. Special damage, if any be laid.

SECTION XI.

Action for Remaining on the Premises an unreasonable time after Distraining.

The landlord cannot appraise or sell goods distrained for rent, until five days after the distress taken and notice of

(r) See *ante*, p. 133.

distress given have expired (*s*). And where the distress is impounded upon the premises, as in that case the landlord is allowed by stat. 11 G. 2, c. 19, s. 10, also to have the goods appraised and sold upon the premises (*t*), he must be allowed a reasonable time for that purpose. But if he exceed what may fairly be deemed a reasonable time, considering the number and value of the articles distrained, and other circumstances,—as he cannot in that case justify under this latter statute, the tenant may have his remedy against him either by action of trespass (*u*), or by action on the case, at his option. If he bring trespass, the declaration will be for trespass *quare clausum fregit*, for continuing on the premises, and disturbing the plaintiff in the possession and enjoyment of them; if in case, the declaration may be as follows.

Declaration.

In the Queen's Bench.

The — day of —, A.D. 18—.

Middlesex to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the defendant, heretofore, to wit, on —, seized and took divers cattle, goods and chattels, to wit, —, of the plaintiff, of great value, to wit, of the value of £—, then found and being in and upon a certain farm, lands and premises of the plaintiff, in the name of a distress for certain arrears of rent pretended to be due and payable for the same to the defendant, and then gave notice thereof to the plaintiff: Yet the defendant, not regarding the statute in such case made and provided, did not nor would remove the said last mentioned cattle, goods and chattels, from the said

last mentioned farm, lands and premises, or cause the same to be there appraised and sold, within a reasonable time after the expiration of five days next after the making of the said last mentioned distress, and giving the said notice thereof, as aforesaid, but wholly neglected and refused so to do, and wrongfully and unjustly, without the licence or consent, and against the will, of the plaintiff, kept and detained the said last mentioned cattle, goods and chattels in and upon the said farm, lands and premises, for a great and unreasonable space of time after the expiration of the said five days as aforesaid, to wit, for the space of — then next following; contrary to the form of the statute in such case made and provided. And the plaintiff claims £ —.

General Issue and Evidence.

The general issue is the same as the form *ante*, p. 290. The plaintiff will have to prove the distress and notice, the time the defendant or his agent afterwards remained upon his premises in possession of the distress, and the special damage, if any be laid.

(*s*) 2 W. & M. sess. 1, c. 5, s. 2, *ante*, p. 133.

(*t*) See *ante*, p. 131.

(*u*) *Winterbourne v. Morgan*, 2

Camp. 117, 11 East, 395. *Etherington v. Popplewell*, 1 East, 139. Per Ld. Denman, in *Ladd v. Thomas*, 12 Ad. & El. 117, 4 Per. & D. 9.

SECTION XII.

Action for selling the Distress before the expiration of Five Days.

By stat. 2 W. & M. sess. 1, c. 5, s. 2, where a landlord distrains for rent, he may cause the distress to be appraised and sold, after the expiration of five days from the making of the distress and giving notice thereof (v). And if the landlord sell the distress within that time, the tenant may have his remedy by action on the case against him. The following may be the form of the declaration.

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—, Middlesex to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that whereas the defendant heretofore, to wit, on —, seized and took divers goods and chattels, to wit, —, of the plaintiff, of great value, to wit, of the value of £—, then found and being in and upon a certain farm, land and premises, situate, &c., as for and in the name of a distress for certain arrears of rent pretended to be due and payable for the same

to the defendant, and then gave notice thereof to the plaintiff; yet the defendant, not regarding the statute in such case made and provided, afterwards, and before the expiration of five days next after such distress so taken and made, and such notice thereof so given, as aforesaid, to wit, within the space of five days then next following, to wit, on —, did sell and dispose of the said goods and chattels, without the leave or licence, and against the will of the plaintiff. And the plaintiff claims £—.

General Issue and Evidence.

The general issue is the same as the form *ante*, p. 290. Under this plea the plaintiff will have to prove—

1. The distress and notice, and particularly the time of serving or leaving the latter.

2. That before the expiration of five days, that is to say, five times 24 hours, from the service or delivery of the notice, the defendant caused the goods to be sold. Where the distress and notice were on Saturday morning the 12th May, and the goods were removed and sold in the afternoon of Thursday the 17th May, and it was argued that this was irregular, because the five days should be reckoned exclusive both of the day of the distress and the day of sale: the court overruled

(v) See *ante*, p. 133.

the objection, saying that on the Thursday afternoon, five days from the time of the distress had completely expired (*b*). Where, however, the distress was made on Friday at two o'clock in the afternoon, and the goods were sold on the Wednesday following at eleven o'clock in the forenoon, it was holden to be wrongful, as five entire days had not elapsed before the sale (*c*).

3. The plaintiff may prove special damage, if any be laid.

SECTION XIII.

Action for the sale of a Distress, without giving Notice thereof.

In what Cases.

We have seen (*ante*, p. 133) that by stat. 2 W. & M. sess. 1, c. 5, s. 2, the tenant is allowed five days after the distress taken, "and notice thereof (with the cause of such taking)" left at the the chief mansion-house or other most most notorious place upon the premises charged with the rent, wherein to replevy the same; and if he do not replevy the distress within that time, then the landlord may proceed to have the distress appraised and sold. So that this notice is a condition precedent to the landlord's appraising or selling; and if he sell without such notice being given, the tenant may have his remedy by action on the case against him. See also stat. 11 G. 2, c. 19, s. 9 (*d*), as to the notice to be given, in certain cases, where a distress is impounded off the premises.

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the defendant heretofore, to wit, on —, seized and took divers goods and chattels, to wit, —, of the plaintiff of great value, to wit, of the value of £—, then found and being in a certain messuage, as for and in the name of a distress for certain supposed arrears of rent, to wit, for the sum of £—, pretended to be due and in arrear from the plaintiff to the

defendant, for and in respect of the said messuage. Nevertheless the defendant, not regarding the statute in such case made and provided, afterwards, to wit, on —, did sell and cause to be sold the said goods and chattels, without any due or proper notice of the said distress, and of the cause of taking the same, being first given to the plaintiff, or left at the said messuage, but wholly neglected to give or leave any such notice, contrary to the form of the statute in such case made and provided. And the plaintiff claims £—.

(*b*) *Wallace v. King et al.*, 1 H. Bl. 13.

(*c*) *Harper v. Taswell*, 6 Car. & P. 166.

(*d*) *Ante*, p. 132.

This declaration is framed on stat. 2 W. & M. sess. 1, c. 5, s. 2, above-mentioned. A count on stat. 11 G. 2, c. 19, s. 9, may readily be framed from it.

General Issue and Evidence.

The general issue is the same as the form *ante*, p. 290. The plaintiff must prove the distress, and for whom made (*e*). He must also prove the sale, and give general evidence that no notice of distress was given or left, as stated in the declaration. As to the defendant's evidence, see *stat.* 11 G. 2, c. 19, s. 21, *ante*, p. 281.

SECTION XIV.

Action for selling the Distress without Appraisement.

The stat. 2 W. & M. sess. 1, c. 5, s. 2, which gives the land lord authority to sell the distress, in liquidation of his claim for rent, allows of his doing so only after appraisement; and that appraisement must be by two appraisers upon oath, and in the manner directed by the statute (*f*). And if he sell the goods without having them previously appraised, the tenant may have his remedy against him by action on the case. But as the complaint in this case is, not of an act done, but of an omission merely, an action of trespass will not lie for it (*g*). The following may be the form of the declaration.

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—. Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that the defendant heretofore, to wit, on —, seized and took divers goods and chattels, to wit, —, of the plaintiff, of great value, to wit, of the value of £—, then found and being in a certain messuage, as for and in the name of a distress for certain supposed arrears of rent, to wit, for the sum of £—, pretended to be due and in arrear from the plaintiff to the

defendant, for and in respect of the said messuage. Nevertheless the defendant, not regarding the statute in such case made and provided, afterwards, to wit, on —, did sell and cause to be sold the said goods and chattels, without any appraisement being first had and made of the same or of any part thereof, but wholly neglected to have any appraisement made thereof, and no appraisement whatever was at any time had or made of the same; contrary to the form of the statute in such case made and provided. And the plaintiff claims £—.

(*e*) See *Ireland v. Johnson et al.*, *post*, p. 312.

(*f*) See *ante*, p. 133.

(*g*) *Missing v. Kemble*, 2 Camp. 115.

Care must be taken that the name of the party, to whom the rent is alleged to be due, be correctly stated. Where the premises had been demised to the plaintiff by Margaret Thorn, as the committee of a lunatic, and the warrant authorizing the distress was signed by Johnson and Vaughan as the agents of Margaret Thorn, but the declaration by mistake stated the distress to have been made for rent due to Johnson and Vaughan: the court held the variance to be fatal, and that the names of the parties, to whom the rent was alleged to be due, could not be rejected as surplusage (*a*).

General Issue and Evidence.

The general issue is the same as the form *ante*, p. 290. The plaintiff must prove the distress, and for whom made (*b*). He must prove the sale, and give general evidence that there was no appraisal. And if the sale were for less than the real value of the goods, he should give evidence of their value.

The defendant, if he have not pleaded the general issue "by statute," may traverse the tenancy (*c*), or plead any other matter of defence specially; but if he plead the general issue "by statute" he may prove any matter of defence under it (*d*).

Verdict.

The plaintiff can only recover the value of the goods, less the amount of the rent due (*e*); and he will be entitled to be allowed whatever he can prove to be the real value, although the goods may have sold for less (*f*). Besides this, he may recover any special damage, laid and proved, which he may have sustained, by reason of the illegal sale (*g*).

SECTION XV.

Action for not selling the Distress for the best price.

By stat. 2 W. & M. sess. 1, c. 5, s. 2, where a landlord has distrained goods and chattels for rent, and, after the five days,

(*a*) *Ireland v. Johnson et al.*, 1 Bing. N. C. 162.

(*b*) See *Ireland v. Johnson et al.*, *supra*.

(*c*) *Yates v. Tearle et al.*, 13 Law J., 289, qb.

(*d*) See stat. 11 G. 2, c. 19, s. 21; *ante*, p. 281.

(*e*) *Briggs v. Goode*, 2 Cr. & J. 364.

(*f*) *Knotts v. Curtis*, 5 Car. & P. 322.

(*g*) *Briggs v. Goode*, *supra*.

has had the same appraised, "he shall and may lawfully sell the goods and chattels so distrained, for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale" (*h*). And if by any neglect or improper conduct of the landlord or his agents, the goods be sold for a less price than they would otherwise have obtained if they were sold fairly, and with reasonable care: the tenant's remedy is by action on the case against the landlord, and against the auctioneer or broker, also, if he were to blame.

Declaration.

In the Queen's Bench.

The — day of —, A.D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that heretofore, to wit, on —, the defendant seized and distrained divers goods and chattels, to wit, —, of the plaintiff, of great value, to wit, of the value of £—, then found and being in and upon a certain messuage as for and in the name of a distress for certain arrears of rent alleged to be due to the defendant for the same, and the defendant afterwards, to wit, on the day and year aforesaid, sold a part of the said goods and chattels, for payment and satis-

faction of the said supposed arrears of rent, and of the charges of the said distress: Yet the defendant, not regarding the statute in such case made and provided, did not, nor would sell the said goods and chattels under the said distress for the best price that could be gotten for the same, but on the contrary thereof, the defendant then wrongfully and injuriously sold the said goods and chattels for much less than the best price (that is to say) for £— less than the best price which might have been gotten and received for the same, had the same been sold in a due and proper manner by the said defendant. And the plaintiff claims £—.

General Issue and Evidence.

The general issue is the same as the form *ante*, p. 290. The plaintiff must prove—

1. The distress, by producing and proving the notice of distress, and, if not signed by the defendant, connecting him with it by evidence.

2. The sale, and the prices for which the goods sold.

3. The undue or improper manner of the sale, and that it was the cause of the goods being sold at an under-value. In an action of this kind, Tindal, C. J., held that the plaintiff might go into evidence to show that the goods were allowed to stand in the rain before they were sold, and that they were improperly lotted (*i*). Where a landlord distrained hay and

(*h*) See *ante*, p. 134.

(*i*) *Poynter v. Buckley*, 5 Car. & P. 512.

straw upon the demised farm, which the tenant, by a covenant in his lease, covenanted not to carry off the farm; and the landlord sold them subject to a condition that the purchasers should consume them upon the premises, and of course sold them for a less price than they would have brought if sold absolutely; and the tenant on this account brought an action against him, for not selling the distress for the best price: the court held that the landlord was right in thus selling conditionally; by the contract between him and the tenant the hay and straw were not to be carried off the premises, and he was not bound therefore to sell it in a manner so as to contravene the provisions of that contract; if it were otherwise, the tenant would be in a better situation by allowing his rent to be distrained for, than by paying it (*k*). But in a subsequent case, in the same court, where it appeared that hay and straw, which a landlord had distrained, were sold conditionally that they should be consumed upon the premises, because by the custom of the country they ought to be so consumed; and an action was brought against him for not selling at the best price: the court doubted very much the authority of *Abbey v. Petch*, and said it was still a disputed question; the case however was decided on other grounds (*l*). And in a still later case in the Exchequer, it was decided that the tenant might in such a case maintain an action for not selling for the best price (*m*).

SECTION XVI.

Action for not returning the Surplus, after the Sale of a Distress.

By stat. 2 W. & M. sess. 1, c. 5, s. 2, after the sale of a distress "towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale," the person who distrained shall leave "the surplus (if any) in the hands of the sheriff, under-sheriff or constable, for the owner's use" (*n*). By the words "sheriff, under-sheriff or constable" here mentioned, is meant the officer (usually the constable) who aided the distrainor in getting the goods appraised, and administered the oath to the appraisers. And if the balance, if any, be not paid into his hands within a reasonable time after the sale of the distress, the tenant may have his remedy against the land-

(*k*) *Abbey v. Petch*, 8 Mees. & W. 419.

(*l*) *Frusher v. Lee et al.*, 10 Mees. & W. 709.

(*m*) *Ridgway v. Ld. Stafford*, 20 Law J. 226, ex.

(*n*) See this section, *ante*, p. 133.

lord by action on the case. The following may be the form of the declaration :—

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that heretofore, to wit, on —, the defendant seized and distrained divers goods and chattels, to wit, —, of him the plaintiff, of great value, to wit, of the value of £—, then found and being in and upon a certain messuage with the appurtenances, situate, &c., as and for and in the name of a distress for certain arrears of rent alleged to be due to the defendant for and in respect of the said messuage. And whereas also the defendant, having caused the said goods and chattels to be appraised, afterwards, to wit, on the day and year aforesaid, sold a part of the said goods and chattels so by him seized and distrained as aforesaid, for payment and satisfaction of the said supposed arrears of rent, and of the charges of the said distress, appraisement, and sale, for divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of £—, being a much larger sum of money than was sufficient to satisfy and discharge all the rent then due for the said messuage or dwelling-house with the appurtenances, and all the charges of the said distress, appraisement and sale. And the plaintiff further saith, that al-

though the defendant afterwards, to wit, on the day and year last aforesaid, out of, and with a part of the produce of the said goods and chattels so by him sold as aforesaid, satisfied the said rent, for which the said goods and chattels were so distrained as aforesaid, and the charges of the said distress, appraisement and sale, leaving a great and considerable overplus of the money produced by the said sale; yet the said defendant, not regarding the statute in such case made and provided, did not, after satisfaction of the rent for which the said goods and chattels were so distrained as aforesaid, and of the charges of the said distress, appraisement and sale, out of the produce of the said goods and chattels so sold as aforesaid, leave the overplus thereof in the hands of the sheriff or under-sheriff of the said county of —, or either of them, or of the constable of the parish where the said distress was so taken as aforesaid, for the use of the plaintiff, so being the owner of the said goods and chattels as aforesaid, although a reasonable time for that purpose hath long since elapsed, and he the said plaintiff hath not yet received, nor been in any way satisfied for such overplus as aforesaid; contrary to the form of the statute in such case made and provided. And the plaintiff claims £—.

General Issue and Evidence.

The general issue is the same as the form *ante*, p. 290. The plaintiff must prove—

1. The distress, by whom, and for what amount, by producing and proving the notice of distress, and, if not signed by the defendant, connecting him with it by evidence.

2. The sale, and the produce of it.

3. If the plaintiff have received a copy of the broker's charges, pursuant to stat. 57 G. 3, c. 13, s. 6 (o), he may con-

test any of the items contained in it, and show that they are unreasonable (*b*). Where the rent distrained for does not exceed 20*l.*, the charges are defined and limited by stat. 57 G. 3, c. 93, s. 1 (*c*).

4. That no balance, or that the real balance (deducting the rent and reasonable charges) was not left with the constable within a reasonable time after the sale, and before action brought; and which should be proved by the constable himself. As the declaration alleges also (following the words of the statute) that it was not left with the sheriff or under-sheriff, it may perhaps be prudent to prove an application for the balance at the office of the under-sheriff.

For the defendant, it may be proved that no balance is coming to the plaintiff, or that the real balance coming to him was paid into the hands of the constable, before action brought. Or he may prove that he paid the balance to the plaintiff himself. But where it appeared that the plaintiff's son had received from the broker, who made the distress, the balance remaining after payment of the rent and the actual charges, making no objection to their unreasonableness; and the judge at the trial laid it down, as matter of law, that such payment and receipt substantially satisfied the requisitions of the statute: this was holden to be incorrect, and that it ought to have been left to the jury to say whether the plaintiff accepted such balance in satisfaction, and if not, whether the sum paid was sufficient to satisfy the real balance which ought to have been paid over (*d*).

SECTION XVII.

The Tenant's Remedy for Excessive Charges of the Distress, &c.

Where the rent distrained for does not exceed 20*l.*, the charges for distraining, appraising and selling, are defined and limited by stat. 57 G. 3, c. 93, s. 1, & sched.; and if any person shall receive, or retain out of the produce of the goods, greater fees than are there mentioned, upon application to a justice of the peace, he may be ordered to pay to the party complaining treble the amount of the moneys so unlawfully received or retained, with full costs, to be levied by distress (*e*). See the whole of this proceeding, with the form of the order, *ante*, pp. 137, 138.

(*b*) *Lyon v. Tomkies et al.*, 1 Mees. & W. 603.

(*c*) See *ante*, p. 137.

(*d*) *Lyon v. Tomkies et al.*, 1 Mees. & W. 603.

(*e*) 57 G. 3, c. 93, s. 2.

Where the rent exceeds 20*l.*, there is no law actually limiting the amount of the costs and expenses of the distress, appraisement or sale (*f*). They must however be reasonable. And to enable the tenant to judge or ascertain whether they are so or not, it is directed by stat. 57 G. 3, c. 93, s. 6, that every broker or other person, levying a distress, shall give "a copy of his charges, and of all the costs and charges of any distress whatsoever," signed by him, to the person on whose goods he has levied (*g*). And if any of the charges be unreasonable, the tenant may contest the amount in an action for not leaving the surplus, after sale of the distress, with the constable,—as has been already mentioned in the last section (*h*).

CHAPTER III.

The Tenant's Remedy against the Landlord, for Entry without Cause.

A landlord, having the reversion in a house, may enter it, after the determination of his tenant's tenancy by a notice to quit or otherwise, either peaceably, or if no person be in the house at the time, even by breaking open the door. Therefore where a tenancy from year to year of land was determined by a notice to quit, but the tenant still retained the possession; the landlord thereupon entered and put his cattle upon the land, and the tenant distrained them as damage feasant; in replevin by the landlord, he pleaded this matter in bar to the avowry, and the tenant replied that he had not quitted or given up the possession in pursuance of the notice to quit; upon demurrer to this replication, the court held that it was bad; they said the case was too clear for argument; the landlord had a right to enter and be upon the land, and if, instead of distraining, the tenant had brought trespass, the landlord might have justified under the plea of *liberum tenementum* (*i*). So, where a tenancy from week to week was determined by a notice to quit, but the tenant omitted to give up possession, and had some little furniture still in the house; the landlord, at a time when there was no person in the house, broke open the door with a crowbar, and other forcible application, and resumed the possession, whereupon the tenant brought tres-

(*f*) See *Child v. Chamberlain et al.*, 5 B. & Ad. 1049.

(*g*) See *ante*, p. 137.

(*h*) *Yates v. Eastwood et al.*, 20 Law J., 308, ex.

(*i*) *Taunton v. Costar*, 7 T. R. 431.

pass: the court held that the landlord had right thus to enter, Dallas, C. J., saying that the case of *Taunton v. Costar* (i) established that he might enter peaceably, and that there was no necessity for an ejectment in such a case, and his using force, when there was no person upon the premises, made no difference; and Park, J., remarked that the declaration alleged it to be the house of the plaintiff, when in fact and in law it was the house of the landlord (k). And in the latter case, Borough, J., said that he had been engaged as counsel in a similar case at the Cockpit, and made use of the same arguments which were then used on the part of the plaintiff; but that Lord Kenyon and Lord Alvanley, who were there, entertained no doubt of the point, and held that the landlord might enter (l). But if any person be upon the premises, and force be used sufficient to constitute it a forcible entry, this will confer no right upon the landlord so entering (m). In all other cases, however, after the landlord thus enters, he may maintain trespass against third parties (n), and even against the tenant himself, if he continue also to hold possession (o). He cannot however forcibly turn the tenant or his family out of possession (p); that can be done by ejectment only.

So a landlord may lawfully enter upon the demised premises, if he have a right of entry for any other cause. And where a landlord was lawfully on his tenant's premises, for the purpose of making a distress, it was holden that his putting up a bill in the window indicating that the premises were to be let, did not make him a trespasser (q).

But if a landlord, not having any right of entry, enter upon the demised premises during the term, he is just as much liable to an action of trespass at the suit of his tenant, as any other stranger would be.

CHAPTER IV.

The Tenant's Remedy, where an Ejectment is brought for a Forfeiture.

A court of equity will in general relieve a tenant against a forfeiture of his term, where it has arisen from the not doing

(i) 7 T. R. 431, cited in the preceding page.

(k) *Turner v. Meymott*, 1 Bing. 158.

(l) *Id.* See also *Lacey v. Lear*, Peake, Ad. Ca. 210.

(m) Per Tindal, C. J., in *Newton v. Harland*, *infra*.

(n) See *Hay v. Moorhouse*, 6 Bing. N. C. 52.

(o) See *Butcher v. Butcher*, 7 B. & C. 399.

(p) *Newton v. Harland*, 1 Man. & Gr. 644. *Hillary v. Gay*, 6 Car. & P. 284.

(q) *Skidmore v. Booth*, 6 Car. & P. 777.

of a thing which may be done afterwards, or a compensation made for it (*r*), particularly where it has arisen from inevitable accident, or from fraud upon the part of the landlord, or by surprise, or from ignorance (not wilful) on the part of the tenant.

From forfeiture for non-payment of rent, courts of equity from the earliest times have relieved the tenant, on payment of the rent, with interest and all expenses (*s*); unless the lease were obtained by fraud, or granted upon a false suggestion (*t*). So, we have seen (*ante*, p. 170), that the court of common law, in which the ejectment is brought for such a forfeiture, will relieve against it, if the application be made before trial. But, if "the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity, within six months after such execution executed,—then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, (other than by bringing error, for reversal of such judgment, in case the same shall be erroneous;) and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease" (*u*). But if "the said lessee, his assignee, or other person claiming any right, title or interest in law or in equity, in or to the said lease, shall within the time aforesaid proceed for relief in any court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into court and lodge with the proper officer such sum and sums of money as the lessor or landlord shall, in his answer, swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain until the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable for so much and no more as he shall really and *bonâ fide* without fraud, deceit or wilful neglect make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen

(*r*) *Davis v. West*, 12 Ves. 475.

(*s*) *Francis's Max. 5. Sanders v. Pope*, 12 Ves. 289. *Mad. Eq. 30.*

(*t*) *Cary*, 45.

(*u*) 15 & 16 Vict. c. 76, s. 210.

to be less than the rent reserved on the said lease, then the said lessee or his assignee before he shall be restored to his possession, shall pay such lessor or landlord, what the money so by him made fell short of the reserved rent, for the time such lessor or landlord held the said lands" (z). In what cases a forfeiture for breach of covenant to pay rent is waived, see *ante*, p. 103.

A court of equity will in general give relief against a forfeiture by breach of covenant to lay out a certain sum in repairs within a certain time (a); or by breach of a covenant to repair generally (b), particularly if arising from accident or surprise (c). But wherever the tenant's conduct, with reference to his covenant, appears to be gross and ruinous (d), or where the landlord has required the tenant to repair, and he has refused to do so (e), or where the breach of covenant appears to have been otherwise wilful and voluntary (f), the court will not in general interfere. In what cases a forfeiture for breach of covenant to repair is waived, see *ante*, p. 106. And as to the liability of the tenant to rebuild, in case the premises are destroyed by fire, see *ante*, p. 180.

A court of equity will, under circumstances, grant relief against a forfeiture for breach of a covenant as to the mode of cultivating a farm (g).

But a court of equity will not relieve against a forfeiture for not insuring (h). Nor will a court of equity relieve against a breach of covenant not to assign, &c., without licence (i).

CHAPTER V.

The Tenant's Remedy for Expulsion by a Stranger.

If the tenant be turned out of possession, or disturbed in his possession, of the demised premises by a stranger,—if such stranger have no title, the tenant's only remedy is by action against the person who has thus dispossessed or disturbed him; by ejectment or trespass, if he be actually put out, or by tres-

(z) 15 & 16 Vict. c. 76, s. 211.

(a) *Sanders v. Pope*, 12 Ves. 282.

(b) *Hack v. Leonard*, 9 Mod. 90. *Exp. Vaughan*, 1 Turn. & Rus. 435. And see *Webber v. Smith*, 2 Vern. 103.

(c) *Hill v. Barclay*, 18 Ves. 62.

(d) See *Hill v. Barclay*, 16 Ves. 404.

(e) *Hill v. Barclay*, 18 Ves. 64.

(f) *De Scarlett v. Dennet*, 9 Mod. 22. *Eaton v. Lyon*, 3 Bro. 693. *Hill v. Barclay*, 18 Ves. 62. *Reynolds v. Pitt*, 19 Ves. 143.

(g) *Lovat v. Ld. Ranelagh*, 3 Ves. & B. 29.

(h) *White v. Warner*, 2 Meriv. 459.

(i) *Hill v. Barclay*, 18 Ves. 64.

pass or case (according to circumstances) if he be merely disturbed in the possession. But if he be put out of possession by a stranger having title, where the ouster comes within the meaning of the landlord's covenant and agreement for quiet enjoyment, express or implied (*k*), the tenant may proceed against the landlord for damages, by action on his covenant or agreement (*l*).

CHAPTER VI.

The Tenant's Remedy against his Landlord, for allowing him to be distrained upon for rent due to the Head-Landlord.

Where a termor underlets the demised premises to another, the law implies a duty upon the part of the termor to indemnify his under-lessee from all consequences of his (the termor's) non-performance of his covenants with the head-landlord; and the under-tenant may have his remedy, by action on the case against the termor for any injury he may sustain by reason of any such breach of covenant (*m*). And therefore where A., holding a house and premises under C. at a certain rent, entered into an agreement with B. for the sale of the household furniture, &c., on the premises, for a certain sum payable by instalments, and that on payment of the whole of the price, he should demise the house and premises to B. for twenty-five years, at a certain rent,—the lease to contain the like covenants on the part of B. as were contained in the lease under which A. held, and that in the mean time, and until such lease should be granted, B. should pay the rent and perform all the covenants which would be to be performed by him in case the lease were actually executed, and with a power of distress for non-payment of rent: B. was let into immediate possession under this agreement, and paid the rent; but A. neglecting to satisfy the rent payable to the superior landlord, the latter distrained upon and sold the goods of B. for it: the court held that an action on the case well lay by B. against A. for the injury sustained by him from this breach of duty (*n*). But where the under-letting was by deed, not containing any covenant to indemnify against the claims of the head landlord, it was holden that the under-tenant could not maintain assumpsit against his landlord for allowing him to be dis-

(*k*) See *ante*, p. 271.

(*m*) *Hancock et al. v. Caffyn*, 8

(*l*) *Williams v. Burrell et al.*,
14 Law J., 98, cp. *Mayor &c. of*
Poole v. Whit, 16 Law J., 229, ex.
See *ante*, pp. 271, 278.

Bing. 358.

(*n*) *Id.* See also *Evans v. Cur-*
tis, 2 Car. & P. 296.

trained upon for rent due to the landlord : the lease being by deed, the tenant's remedy, if any, was by action of covenant upon the implied covenant for quiet enjoyment (*o*). So, where a tenant assigned his term to another by deed, not containing any covenant of indemnity against the claims of the head landlord, and the latter distrained upon the assignee for rent due before the assignment, and he was obliged to pay it, to prevent his goods from being sold : the court held that the assignee could not maintain assumpsit against the assignor, as upon an implied promise to indemnify him, but that his remedy was by action of covenant, upon the implied covenant arising from the word "grant" in the assignment (*p*). But where the demise is not by deed, the proper remedy is by action on the case (*q*), although assumpsit may also lie (*r*). The following is the form of the declaration in case.

Declaration.

In the Queen's Bench.

The — day of —, A.D. 18—.

Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, sues C. D., the defendant in this suit: For that before and at the time of committing the grievance by the defendant as hereinafter mentioned, the defendant held a certain messuage as tenant thereof to one G. H., at and under a certain yearly rent, to wit, the yearly rent of £—, payable by the defendant to the said G. H., and that whilst the defendant was such tenant to the said G. H., to wit, on —, and before and at the time of committing the grievances hereinafter mentioned, the plaintiff, at the special instance and request of the defendant, had become and was tenant to the defendant of the said messuage at and under a certain yearly rent, to wit, the yearly rent of £—, payable by the plaintiff to the defendant; and thereupon it became and was the duty of the defendant, during the continuance of the said last mentioned tenancy, to pay the said first mentioned rent to the said G. H.

and to indemnify and save harmless the plaintiff, from and against the payment of any of the said yearly rent so payable to the said G. H., as aforesaid, over and beyond the amount of the said rent, so payable by the plaintiff to the defendant as aforesaid, which might be due and in arrear from the plaintiff to the defendant, and from and against any distress, or costs, charges, damages or expenses which should or might be made, arise or happen to the plaintiff, for or by reason of the non-payment thereof. And although the said tenancy of the defendant to G. H., and the said tenancy of the plaintiff to the defendant were and continued for a long time, until and after the committing of the grievances hereinafter mentioned, to wit, hitherto, and although a small sum of money only, to wit, the sum of £—, was due and in arrear from the plaintiff to the defendant, at the time of committing the grievance hereinafter mentioned; Yet the defendant not regarding his duty aforesaid, did not nor would during the continuance of the said tenan-

(*o*) *Schlencker et al. v. Moxsy*, 3 B. & C. 789.

(*p*) *Baker v. Harris*, 9 Ad. & El. 532.

(*q*) *Hancock et al. v. Caffyn*, 8 Bing. 358.

(*r*) Per Tindal, C. J., *Id.* 366. But see *Jackson v. Cobbin*, 8 Mees. & W. 790.

cies, pay the said first mentioned rent to the said G. H., or indemnify or save harmless the plaintiff, according to his said duty in that behalf as aforesaid, but wholly neglected so to do, and by reason thereof, during the continuance of the said respective tenancies, and whilst the said plaintiff occupied and enjoyed the said messuage and premises with the appurtenances, as such tenant as aforesaid, to wit, on —, a certain distress was made by and on the behalf of the said G. H., on certain goods and chattels of the said plaintiff, of great value, to wit, of the value of £—, then in and upon the said messuage and premises, for a certain sum of money, to wit, the sum of £—, then due and in arrear to the said G. H., for and in respect of the said yearly rent, so payable to him as aforesaid, being in amount much over and beyond, to wit,

£—, over and beyond the said rent so due and in arrear from the plaintiff to the defendant as aforesaid; and the said G. H., afterwards, to wit, on the day and year last aforesaid, sold the said goods and chattels as such distress as aforesaid, for and towards payment and satisfaction of the said rent so due and owing to him, from the defendant, and of the costs and charges of the said distress and incident thereto; [Or, by means of the premises, the plaintiff was not only put to and suffered great trouble and inconvenience, but was forced and obliged to and did necessarily pay the said sum of £—, together with the charges of the said distress, and incident thereto, in the whole amounting to a large sum of money, to wit, the sum of £—.] And the plaintiff claims £—.

Or the declaration may be in assumpsit, with a count for money paid added.

General Issue, and Evidence.

The general issue is the same as the form *ante*, p. 290, except that the words "by statute" are not inserted in the margin, this not being a case within stat. 11 G. 2, c. 19, s. 21 (*s*). The plaintiff under this plea, will have to prove the breach of duty complained of, namely, the distress and sale or payment, that the rent distrained for was due,—and the damage, by proving the value of the goods sold, or the amount of the money paid. If the defendant would put the plaintiff to the proof of any part of the inducement in the declaration, he must traverse it. So, if he have any defence, which confesses and avoids the cause of action stated, he must plead it specially.

CHAPTER VII.

Right of the Tenant to Emblements.

Emblements, what.] Emblements mean crops of corn or other produce, which ordinarily repay the tenant for his

(s) See *ante*, p. 281.

labour within a year after they are sown, although in extraordinary seasons they may be possibly delayed beyond that period (a). And therefore where a tenant *pur auter vie* sowed his land with barley in the spring, and soon after with clover, and the life expired in the following summer: it was holden that he was entitled to the barley as emblements, and to the clover which was mown with it, but not to the subsequent crops of the clover (b). The only seeming exception to this, is the case of hops; they are deemed emblements, though raised from the ancient roots (c). But if a tenant plant young trees, or sow the land with acorns, these are not emblements, for they yield no present annual profit (d); that is to say, they are not of a nature to remunerate the tenant for his labour and expense in planting within a year after the planting. So grass already growing is not emblements; even if the tenant sow the land with grass seeds, so as very much to increase the grass already growing, he shall not be entitled to it as emblements (e).

Right to them generally.] The general rule as to the right to emblements is this,—if the term for which a tenant holds be uncertain or contingent, so that at the time he sows his crop he cannot predicate that his tenancy will continue until he shall have reaped it, then he shall be entitled to the crop as emblements. But if his term be certain, and not depending upon any contingency, and at the time he sows his crop he knows that his term will not continue until he shall have reaped it, then he will not be entitled to the crop as emblements; he may be entitled to it as an offgoing crop, or to the value of it, by express stipulation with his landlord, or by the custom of the country, but not as emblements.

To entitle a tenant to emblements, however, the crop must be sown, though not reaped, &c., before the happening of the act or contingency by which his estate is determined (f).

Right of tenant at rackrent.] By stat. 14 & 15 Vict. c. 25, s. 1, where the lease or tenancy of any farm or lands, held by a tenant at rackrent, shall determine by the death or cesser of the estate of any landlord entitled for his life or for any other uncertain interest,—instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in

(a) Per Cur. in *Graves v. Weld*,
5 B. & Ad. 118.

(b) *Graves v. Weld*, 5 B. & Ad.
105.

(c) *Latham v. Atwood*, Cro. Car.
515.

(d) Co. Lit. 55. a.

(e) Co. Lit. 56.

(f) Bro. Abr. Emblements, 7.
Tenant per copie, 3.

the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions, and restrictions, to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid (g).

Right of tenant for life.] Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such determination is contingent and uncertain (h). Therefore if a tenant for the term of his own life sow the lands, and die before harvest, his executors or administrator shall have the emblements or profits of the crop; for the estate was determined by the act of God, and it is a maxim of law that *actus Dei nemini facit injuriam* (i). Another case, within the reason of this maxim, is, where a tenant in fee simple dies, leaving only a daughter, who enters and sows the land; but the wife of the deceased, *privement enseinte* at the time, afterwards and before severance is delivered of a son: the daughter shall be entitled to the emblements, for her estate was put an end to by the act of God (k). So if A. give a bond that B. shall enjoy a lease of Blackacre immediately after his death,—upon the death of A., the corn growing on Blackacre belongs to A.'s executors, not to B. (l). If a man lease to two for their joint lives, and one of them dies, the other shall have the corn (m). So if tenant in dower sow the land of which she is endowed, and die before severance, her executors will be entitled to the emblements. So, where a widow, entitled to her free bench, sows the land, and dies before severance, her executors are entitled to emblements, in the same

(g) 14 & 15 Vict. c. 23, s. 1.

(h) Co. Lit. 55.

(i) 2 Bl. Com. 123. Bro. Abr.

Emblements, 6.

(k) Co. Lit. 53. b.

(l) *Launtton's case*, 4 Leon. 1.

(m) Bro. Abr. Emblements, 5.

manner as tenant in dower (*m*). So if tenant in tail after possibility of issue extinct sow the land, and die before severance, his executors shall have the emblements (*n*). So it is also, if a man be tenant for the life of another, and the *cestui que vie* die after the land is sown, the tenant *pur auter vie* shall have the emblements (*o*). Formerly, if a parson died before the day of the Conception of the Virgin Mary, his glebe being sown, his successor was entitled to the emblements, by the law of Holy Church (*p*); but this has since been altered by stat. 28 H. 8, c. 11, s. 6, and they now go to the executor of the deceased incumbent. If a man seised of lands in fee, sow them, and devise them to A. for life, remainder to B., and die before severance, and the devisee for life also die before severance, his executors shall not have the emblements, but they shall be the property of the remainderman (*q*). But in all cases where a man devises the fee in land sown, and dies before severance, the crop belongs to the devisee, and not to the executors of the devisor, whether the devise was made before or after the land was sown (*r*). So, if a man seised of land, sow it, and then convey it to A. for life, remainder to B. in fee, and A. die before severance, the executors of A. shall not have the emblements, but they become the property of the remainderman (*s*). But where land is sold, the vendee is entitled to the crops of all that part in the occupation of the vendor, however ripe or ready for cutting they may be, unless there be some stipulation in the conveyance to the contrary (*t*); and the vendor's dying before severance of course makes no difference.

And in all these cases, where tenants for lives or their representatives would be entitled to emblements, if they have underlet them for the life or for years, and the underlease be determined by the death of the lessor or *cestui que vie*, the undertenant will be entitled to the emblements, and not the lessor or his executors.

Tenant for term of years.] Where the determination of an estate for years is certain, as where lands are let for twenty-one years, or the like, the tenant is not entitled to emblements; for it was his own folly to sow, when he knew he could not reap. But where the determination of an estate for years depends on an uncertain event, as where a tenant for life lets lands for a term of years, or where a term for years is made

(*m*) *Oland's case*, 5 Co. 116. Cro. El. 460.

(*n*) Bro. Abr. Emblements, 13.

(*o*) 2 Bl. Com. 123; Co. Lit. 55. b; Hob. 132, 178; Bro. Abr. Emblements, 16.

(*p*) Bro. Abr. Dean & Ch. 1, cites 34 H. 6, 38.

(*q*) *Grantham v. Hawley*, Hob. 132. *Allen's case*, Winch. 51.

(*r*) *Spencer's case*, Winch. 51, 52.

(*s*) *Grantham v. Hawley*, Hob. 132.

(*t*) Went. Ex. 59.

determinable on the death of a particular person,—then the tenant, formerly entitled to emblements, in the same manner as a tenant for life (u), will now be entitled to hold over until the expiration of the current year of his tenancy, and to have the crops accruing during that time, instead of emblements (v).

So, where there is a tenancy from year to year,—if the landlord determine it by a notice to quit; any crops sown before the notice was given, and not severed before the expiration of it, belong to the tenant; but otherwise, if the tenant gave the notice.

Tenant at will.] Where an estate at will is determined by the lessor, the tenant is entitled to the corn sown and other emblements; but it is otherwise if the tenant determine the tenancy (w). So, if the lessor be outlawed, whereby the will is determined, the lessee shall have the emblements, although the Crown be entitled to the profits; but if the lessee be outlawed, the Crown shall have the emblements (x).

Tenant by Elegit or Statute Merchant.] If tenant by statute merchant sow the land, and before severance a casual profit happen, by which he is satisfied,—he shall be entitled to the emblements notwithstanding (y). And the same, as to tenant by elegit.

Husband, jure uxoris.] If a husband, seised in right of his wife, sow the land, and die, his executors shall have the emblements (z). So, if the wife die, the husband shall have the emblements (a). So, if the husband and wife be joint tenants, and the husband sow the land and die, it seems that his executors, and not the wife, shall have the emblements (b); but this has been very much doubted (c); and where husband and wife, tenants in tail, sowed the land, and the husband died before severance, it was holden that the wife should have the emblements, and not the executors of the husband (d). But if the wife survive, and be endowed of the lands, she shall have the emblements of that part of which she is endowed, and not the executors (e). And if, being thus endowed, she sow the land, and marry again, and her husband die before severance,

(u) Lit. 68; Co. Lit. 55. b; 1 Cruise, 249, s. 18. *Oland's case*, 5 Co. 116; Gouldsb. 144, pl. 60.

(v) 14 & 15 Vict. c. 25, s. 1, ante, p. 324.

(w) Lit. 68; *Oland's case*, 5 Co. 116. *Perrott v. Bridges*, Vent. 222. Bro. Abr. Emblements, 13. Per Gawdy, J. Godb. 145.

(x) *Oland's case*, 5 Co. 116.

(y) Co. Lit. 55. b.

(z) Co. Lit. 55. b; Bro. Abr. Emblements, 16.

(a) Co. Lit. 55. b; Bro. Abr. Emblements, 16.

(b) *Shell v. Arnold*, Dy. 316.

(c) Co. Lit. 55. b; Cro. El. 61, pl. 3; Godb. 189, pl. 270.

(d) Bro. Abr. Emblements, 15. and see *Rowney's case*, 2 Vern. 322.

(e) 2 Inst. 81. Anon. Brownl. 44.

she shall have the emblements (*e*) ; but if the husband sowed the land, his executors, and not the wife, would be entitled to them (*f*). If a man, seised *jure uxoris*, sow the land, and he and his wife be afterwards divorced *à vinculo, causâ precontractus*, he shall have the emblements, even although the suit for the divorce were instituted by him ; for still it is the act of law, and not of the party, which determines the estate (*g*).

And where the husband or his executors would be entitled thus to emblements,—if the land, instead of being in his occupation, be in the occupation of a tenant who sows it, the tenant will be entitled to the emblements (*h*).

Where the estate is determined by the tenant.] Where the tenancy is determined by any act or omission of the tenant himself, he is not entitled to emblements. If a tenant at will determine the will, we have seen (*supra*) that he is not entitled to emblements. So, if lessee for life or years sow the land, and afterwards surrender the term to the reversioner before severance, he will not be entitled to emblements (*i*). If land be let to a man, on condition that if he do a certain act the term shall cease ; and he sows the land, and afterwards and before severance he does the act specified in the condition : he shall not be entitled to emblements (*k*), if before severance the lessor enter for the condition broken (*l*). If there be a clause of re-entry in a lease for non-performance of covenants, and the lessee, after sowing the land, and before severance, does or omits to do some act, which is a breach of one of the covenants, he is not entitled to emblements ; for he himself, by his act or neglect, has put an end to the term (*m*). And the same in all cases where there is a forfeiture of the term, by the act or omission of the tenant ; as, for instance, if tenant for years claim in fee, after sowing the land, and before severance (*n*), or the like (*o*). So, in the case of copyhold premises, if after sowing the land the copyholder be guilty of any act or omission amounting to a forfeiture, and the lord enter for it before severance, the lord, and not the copyholder, shall have the emblements (*p*). If a widow, having lands *durante viduitate*, sow them, and afterwards before severance take husband, she will not be entitled to the emblements (*q*).

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| (<i>e</i>) Bro. Abr. Emblements, 26. | (<i>l</i>) Bro. Abr. Emblements, 18. |
| (<i>f</i>) Bro. Abr. Emblements, 26. | (<i>m</i>) Co. Lit. 55. b. <i>Oland's case</i> , |
| (<i>g</i>) <i>Oland's case</i> , 5 Co. 116. | supra. |
| (<i>h</i>) Bro. Abr. Lease, 24. Emblements, 6. | (<i>n</i>) Per Popham, C. J., Cro. El. 461. |
| (<i>i</i>) Per Popham, C. J. in <i>Oland v. Burdwick</i> , Cro. El. 461. <i>Weeper v. Handall</i> , 9 Vin. Emblements, 11. | (<i>o</i>) Godb. 190, pl. 126. |
| (<i>k</i>) Co. Lit. 55. b. <i>Oland's case</i> , 5 Co. 116 ; Cro. El. 461. <i>Davis v. Eyton</i> , 7 Bing. 154. | (<i>p</i>) Bro. Abr. Emblements, 4. <i>Brown's case</i> , 4 Co. 21 b. |
| | (<i>q</i>) Co. Lit. 55. b. <i>Oland's case</i> , supra. |

Where the estate is determined by action or entry.] Where after land is sown and before severance it is recovered by action, the party who has recovered, and not the defendant or tenant, shall have the emblements (*r*). So where, after judgment against him, the tenant sowed the lands, and then brought a writ of error on the judgment, but it was affirmed: he was holden not to be entitled to emblements (*s*). So, if A. disseise B., and sow the land, and afterwards and before severance B. enters, B. shall have the emblements (*t*). Or if A. have cut the crop before B. enters, and B. carry it away, it is said that he will be justified in doing so (*u*); but this is doubted (*v*); it is clear however that if the disseisee enter before severance, and then the disseisor enter upon him, and cut the crop, and the disseisee again enter whilst the crop is upon the ground, the latter shall have the emblements, by reason of his former entry before severance (*w*).

Right of Executor, &c.] Emblements, though not strictly personal chattels, are distinct from the real estate in the land, and are subject to many, though not all, the incidents attending personal chattels. They were devisable by testament, before the statute of wills (*x*). And where a man, entitled to emblements, dies before severance, his personal representatives shall have them, and not his heir (*y*). So, where a husband, seised in right of his wife, sows the land, and dies before severance, his executors, and not the heir, shall have the emblements (*z*). But carrots, parsnips, turnips, &c. which are within the ground, and cannot be come at without breaking the soil, (which the executors cannot lawfully do,) go to the heir, and not to the executors (*a*).

Where joint-tenants sow the land, and one dies before severance, the other is entitled to the whole of the crop (*b*). And the same, it should seem, where husband and wife are joint-tenants (*c*). So, if A. and B., joint-tenants, sow the land; and A. let his moiety to another, and B. dies before severance: A. shall be entitled to the other moiety by survivorship (*d*).

Right to emblements, by express agreement.] If by express agreement between the lessor and lessee, the latter is to have the emblements at the end of his term, he shall have them,

(*r*) Bro. Abr. Emblements, 8, 11.
(*s*) *Wicks v. Jordan*, 2 Bulst. 213.

(*t*) Bro. Abr. Emblements, 1, 10.
(*u*) *Id.* 12.
(*v*) See Vin. Emblements, 48, 54.
Bro. Abr. Chattels, 10, Emblements, 10, 13, 17, 18, 19, 20.

(*w*) Bro. Abr. Chattels, 10, Property, 18.

(*x*) Perk. s. 512. Bro. Abr. Emblements, 22.

(*y*) Bro. Abr. Emblements, 9.
(*z*) Went. Ex. 59.
(*a*) Went. Ex. 63.
(*b*) Arg. in *Rowney's case*, 2 Vern. 322.

(*c*) See *ante*, p. 327.
(*d*) Arg. Owen. 102, and see *Geanes v. Portman*, Cro. El. 314.

whether he would otherwise be entitled to them or not. And, therefore, where in a lease of lands, the lessor covenanted that the lessee, his executors, &c., might carry away such corn as should be growing on the land at the end of the term; and he afterwards conveyed his reversion to A.; the executors of the lessee, in the last year of the term, sowed the land, and sold to B. the crop growing on the land at the end of the term: it was objected for A., that the lessor had no property in this crop, and therefore could not grant it away; but the court held that as he had a right to the land, he had a right to make this contract with respect to its produce (*a*). So, a lessee may be entitled to emblements by the custom of the country, and that custom will be deemed to be engrafted upon the demise, and to form a part of it. See this subject considered more particularly, *post*, p. 343.

(*a*) Nels. Abr. 702, pl. 9, cites *Grantham v. Hawley*, Hob. 132.

PART V.

THE TENANT'S REMEDIES AGAINST STRANGERS.

CHAPTER I.

The Tenant's Remedy for Trespass.

After a tenant has entered upon the demised premises, and is thereof possessed, he may maintain an action of trespass against any person who trespasses upon them. As to what amounts to a trespass to land, by and against whom the action may be maintained, the several pleadings in the action, and the evidence necessary to maintain them, see 1 Arch. *Nisi Prius*, 2 Ed. p. 405, *et seq.*

In the case of a trespass committed in search or pursuit of game, the tenant may maintain an action of trespass against any person guilty of it,—with the exception of his landlord or any person authorized by him, in the cases which shall be presently mentioned. It is not usual, however, to bring an action in the first instance, without previously giving the party a notice not to trespass on the land in future; because without that notice, the plaintiff will not be entitled to costs, if he recover less than 40*s.* damages. But if after such notice the party again trespass on the land, the tenant may safely bring an action of trespass against him, and will be entitled to his costs, if he recover a verdict for damages to any amount. The statute which regulates the costs in this instance is stat. 3 & 4 Vict. c. 24, by the second section of which it is enacted, that if a plaintiff in an action of trespass, brought in any of her Majesty's courts at Westminster, or in the court of Common Pleas at Lancaster, or court of Common Pleas at Durham, shall recover less than 40*s.* he shall not be entitled to any costs whatever; but by the third section, it is provided, that the Act shall not extend to deprive any plaintiff of costs, in any action brought for a trespass over any lands, commons, wastes, closes, woods, plantations or inclosures, or for entering into any dwellings, outbuildings or premises, in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or

occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action.

As to the right of the landlord, or of persons authorized by him, to go upon the demised land, it is usually made the matter of express stipulation in the lease, that they shall have liberty to do so,—particularly in leases made since the passing the last General Game Act, 1 & 2 W. 4, c. 32, 5th October, 1831. And by the seventh section of that Act, “in all cases where any persons shall occupy any land under any lease or agreement made previously to the passing of this Act, except in the cases hereinafter next excepted, the lessor or landlord shall have the right of entering upon such land, or of authorizing any other person or persons who shall have obtained an annual game certificate to enter upon such land, for the purpose of taking or killing the game thereon; and no person occupying any land, under any lease or agreement, either for life or years, made previously to the passing of this Act, shall have the right to kill or take the game on such land,—except when the right of killing the game upon such land has been expressly granted or allowed to such persons by such lease or agreement,—or except where, upon the original granting or renewal of such lease or agreement, a fine or fines shall have been taken,—or except where, in the case of a term for years, such lease or agreement shall have been made for a term exceeding twenty-one years.” Also, “nothing in this Act contained, shall authorize any person, seised or possessed of or holding any land, to kill or take the game, or to permit any other person to take or kill the game, upon such land, in any case where, by any deed, grant, lease, or any written or parol demise or contract, a right of entry upon such land for the purpose of killing or taking the game hath been or hereafter shall be reserved or retained by, or given or allowed to any grantor, lessor, landlord, or other person whatsoever” (y).

And “where the lessor or landlord shall have reserved to himself the right of killing the game upon any land, it shall be lawful for him to authorize any other person or persons, who shall have obtained an annual game certificate, to enter upon such land, for the purpose of pursuing and killing game thereon” (z).

(y) 1 & 2 W. 4, c. 32, s. 8.

(z) *Id.* s. 11.

CHAPTER II.

The Tenant's Remedy for Disturbance of Common.

SECT. 1. *The Tenant's Remedy against a Commoner, or Stranger.*

2. *Tenant's Remedy against the Lord.*

SECTION I.

Tenant's Remedy against a Commoner or Stranger.

First, as to common of pasture; if a stranger, who has no right, put his cattle upon the common, the lord may distrain them damage feasant, or may have his remedy by action of trespass; and the commoner may distrain them damage feasant, or have his remedy by action on the case (*a*).

If a commoner surcharge the common, the lord may distrain the extra beasts, or may have his remedy by action of trespass, and the other commoners may have their remedy by action on the case (*b*).

As to common of piscary, turbary, estovers, &c., if any person having a right to such common be disturbed in his enjoyment of it, the general remedy is by action on the case.

As to the extent to which a right of this kind may be claimed, it has long since been settled that a man may prescribe to have even the sole and several pasture, vesture, or herbage, for a limited time in every year, in exclusion of the owner of the soil (*c*). And this may be claimed, as in gross, without being appurtenant to any land (*d*). Whether a prescription for a sole and several pasture, &c., in exclusion of the owner of the soil, for the whole year, is good, was for some time a question. In *North v. Coe*, (*e*) the court of Common Pleas were equally divided upon it. In *Potter v. North* (*f*), the court of King's Bench inclined to think that such a prescription might be supported. And in *Hoskins v. Robins* (*g*), it was adjudged, and the law has been so considered ever since, that this prescription is good; for it does not exclude the lord

(*a*) *Cheeseman v. Hardham*, 1 B. & A. 706. *Ricketts v. Salway*, 2 Id. 300.

(*b*) See *Bowen v. Jenkin*, 6 Ad. & El. 911.

(*c*) Fitz. Prescription, 51. Co. Lit. 122. a. 2 Ro. Abr. 267, L. pl. 6.

Spanke's case, Winch. Rep. 6. Pitt v. Chick, Hut. 45.

(*d*) *Welcome v. Upton*, 6 Mees. & W. 636.

(*e*) Vaugh. 251, 1 Lev. 253.

(*f*) 1 Saund. 350.

(*g*) 2 Saund. 324, 2 Lev. 2, Pollexf. 13, 1 Mod. 74.

from all the profits of the land, as he is still entitled to the mines, trees, and quarries. So, a tenant may prescribe to have all the thorns growing upon such a place, in exclusion of the owner of the soil (*h*). But a man cannot prescribe to have *common eo nomine* for the whole year, in exclusion of the lord, for that would be repugnant to the nature of the thing (*i*); but he may, for a part of the year (*k*). The land itself, however, cannot be claimed by prescription. And therefore it has been holden, that although a man may prescribe to take coal in the close of another, he cannot claim by prescription the whole substratum of coal lying beneath the close; nothing but what lies in grant can be claimed by prescription (*l*).

Declaration.

In the Queen's Bench.

The — day of —, A. D. 18—. Middlesex, to wit: A. B., the plaintiff in this suit, by E. F., his attorney, complains of C. D., the defendant in this suit: For that whereas the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain messuage, and divers, to wit, — acres of land, with the appurtenances, situate and being in the parish of —, in the county of —; and by reason thereof, during all the time aforesaid, of right ought to have had, and still of right ought to have, common of pasture for all his commonable [sheep] levant and couchant in and upon his said messuage and land, with the appurtenances, in a certain place, waste, or common, called the —, situate —, every year, at all times of the year, as to the said messuage and land with the appurtenances belonging and appertaining: Yet the defendant, well knowing the premises, but contriving and wrong-

fully and unjustly intending to injure, prejudice and aggrieve the plaintiff in this behalf, whilst he was so possessed of his said messuage and land with the appurtenances, and entitled to such common of pasture as aforesaid, to wit, on —, and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly put and caused to be put divers, to wit, — sheep in and upon the said place, waste or common, called the —, and kept and depastured the same there respectively for a long time, to wit, from the putting of the same there respectively as aforesaid hitherto: Whereby the plaintiff, on those several days and times, and during all the time aforesaid, was and is greatly injured and disturbed in the use and enjoyment of his said common of pasture there, and could not nor can have or enjoy the same in so large, ample and beneficial a manner as he otherwise during all the time aforesaid might and would have had and enjoyed the same. And the plaintiff claims £—.

It is not actually necessary, in pleading, to state the right of common to be appurtenant to land *eo nomine*; if it be laid

(*h*) *Dowglass v. Kendal*, Cro. Jac. 256.

(*i*) Co. Lit. 122. a. 1 Ro. Abr. 396. 2 Id. 267.

(*k*) See *Kenrick v. Pargeter*, Yelv. 129. Cro. Jac. 208.

(*l*) *Wilkinson v. Prout et al.*, 12 Law J. 227, ex. 11 Mees. & W. 33.

as appurtenant to a thing which, in intendment of law, *prima facie*, comprehends land, such as a messuage (*m*), or a cottage (*n*) or the like, it will be sufficient on the face of the declaration; for the law, upon demurrer or after verdict, will presume that there is at least a curtilage belonging to them, on which cattle may be levant and couchant (*o*). But still it must be proved on the trial, where the levancy and couchancy are put in issue, that the cattle are levant and couchant upon the tenement in respect of which the right is claimed (*p*).

Nor is it necessary to set out any title to the common, either by prescription or otherwise (*q*); although formerly it was the practice (*r*), and it is still requisite to do so in a plea of right of common (*s*).

And it is sufficient to state the disturbance generally, as in the above form, as well in a declaration against a commoner for surcharging the common, as against a stranger (*t*). But in an action against the lord, it seems necessary to show the surcharge in particular (*u*). And the declaration must allege that the defendant thereby could not use his common in so ample a manner as he ought to have done (*v*).

General Issue and Evidence.

In the Queen's Bench.

The — day of —, A. D. 18—.

C. D. }
ats. } The defendant, by G. H., his attorney, says that he is not guilty.
A. B. }

This plea merely puts in issue the wrongful act complained of (*w*); namely, the surcharge, where the action is against a commoner, or the fact of the defendant's putting cattle on the common, in an action against a stranger. If the defendant would controvert any allegation in the inducement of the declaration,—the plaintiff's possession of the premises in right of which he claims, or the plaintiff's right of common,—he must traverse it. And if he would set up as a defence any matter which confesses the cause of action, and avoids it, he must plead it specially (*x*)

(*m*) *Patrick v. Lowe*, Brownl. 101. *Hockley v. Lambe*, 1 *Ld. Raym.* 726.

(*n*) *Co. Ent.* 649 a. *Emerton v. Selby*, 2 *Ld. Raym.* 1015.

(*o*) *Seamler v. Johnson*, T. Jon. 227.

(*p*) 1 *Saund.* 346 c.

(*q*) *Crowther v. Oldfield*, 2 *Ld. Raym.* 1230. *Atkinson v. Teasdale*, 3 *Wils.* 280. *Bean v. Bloom*, *Id.* 458. *Saunders v. Williams*, 1

Vent. 319. *Strode v. Birt*, 4 *Mod.* 418.

(*r*) *Co. Ent.* 9. 1 *Saund.* 346, n. 2.

(*s*) *Grinstead v. Marlow*, 4 *T. R.* 718, 719. *Stringer's case*, *Cro. Car.* 549.

(*t*) *Atkinson v. Teasdale*, 3 *Wils.* 278.

(*u*) 3 *Wils.* 290.

(*v*) *Mary's case*, 9 *Co.* 113 a.

(*w*) *R. Pl.* 1853, s. 16.

(*x*) *Id.* s. 17.

In Mary's case (x) it was said "that for every feeding by the cattle of a stranger, the commoner shall not have an action upon the case, but the feeding ought to be such, *per quod* the commoner common of pasture for his cattle *habere non potuit*; so that if the trespass be so small that he has not any loss, but sufficient in ample manner remains for him, no action lies for it." But Mr. Serjeant Williams, in reference to this passage, says (y), that it seems this rule must be understood with some restriction: undoubtedly, if cattle escape into the common, and be driven out by the owner as soon as he has notice, though the lord may have an action of trespass for injury to his soil, the commoner cannot have an action for the injury to his right of common,—this falling directly within the above rule; but if cattle be permitted by their owners to depasture the common, whether they belong to a stranger, or be the supernumerary cattle of a commoner, and whether they are driven or escape there, a commoner may have an action on the case, whether he have sustained any specific injury or not; for the consumption of the grass by the other cattle is of itself a diminution of the right and profit of the commoner. Besides the law considers that the right of the commoner is injured by such an act; and therefore allows him to bring an action for it, in order to prevent the wrong-doer from acquiring any right by repeated acts of encroachment (z).

But if the defendant be lord of the manor, or put his cattle on the common by licence of the lord, the commoner cannot maintain an action unless he have sustained a specific injury: It is not sufficient that the cattle consumed the grass, as in the case of a stranger, but there must not be a sufficiency of common left for the commoners, to enable them to support the action; for the lord is entitled to what remains of the grass, and therefore may consume it by his own cattle, or license another to depasture it (a). But it is necessary, in pleading such a licence, to state that a sufficiency of common was left for the commoners (b); and if the fact be traversed, the defendant must prove it.

Traverse, Plaintiff not possessed, &c.

And for a further plea in this behalf, the defendant says that the plaintiff was not possessed of the said [messuage and land] in the said

declaration mentioned, in manner and form as the plaintiff has above in that behalf alleged.

(x) 9 Co. 113 a.

(y) 1 Saund. 346 a, *in notis*.

(z) *Wells v. Watling*, 2 W. Bl. 1233. *Hobson v. Todd*, 4 T. R. 71.

(a) *Per Buller, J.*, in *Hobson v.*

Todd, 4 T. R. 73. *Smith v. Feverell*, 2 Mod. 6.

(b) See *Smith v. Feverell*, 2 Mod. 6.

This merely puts in issue the fact of the defendant being in possession, in his own right, of the premises, by reason of which he claims the right of common, at the time of the alleged disturbance. Nor can the plaintiff's title to such premises be at all impugned in this action, by a stranger; all the defendant can do, is to traverse the plaintiff's right of common.

Traverse of the Right of Common.

And for a further plea in this behalf, the defendant says that the plaintiff of right ought not to have had, and still of right ought not to have, common pasture for all his commonable [sheep] levant and couchant in and upon the said messuage and land with the appurtenances in the said declaration

mentioned, in the said place, waste or common called —, every year at all times of the year, as to the said messuage and land with the appurtenances belonging or appertaining, in manner and form as the plaintiff has above in that behalf alleged.

Evidence for the Plaintiff.

The onus of proof in this case lies upon the plaintiff.

Formerly, a party, not a copyholder, must have claimed a right of common, by shewing a seisin in fee of the land, by reason of which he claimed the right, either in himself or in some other under whom he derived title, and then have proved an user by prescription in a *que estate*, that is to say, by all those whose estate he hath, of the right of common claimed (c). A copyholder, on the other hand, could not prescribe for it, by reason of the baseness of his estate, but he must have alleged and proved it by way of custom (d). But, by stat. 2 & 3 W. 4, c. 71, s. 1, after reciting that the title to matters which have long been enjoyed is thus sometimes defeated, by showing the commencement of such enjoyment,—which is in many cases productive of inconvenience and injustice: it is enacted, “that no claim, which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our Sovereign Lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster, or the Duchy of Cornwall, or of any ecclesiastical or lay person or body corporate, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of *thirty* years, be defeated or destroyed by showing only that

(c) *Grinstead v. Marlowe*, 4 T. R. 718. *Stringer's case*, Cro. Car. 349. See *Hendy et al. v. Stevenson et al.*, 10 East, 55.

(d) 4 Co. 31 b. 6 Co. 60 b. Cro. El. 390, 2 Lutw. 1328. Moore, 461.

such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated. And when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing" (c). But no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time (d). Each of the periods here mentioned "shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period shall relate, shall have been or shall be brought into question; and that no act or other matter shall be deemed to be an interruption, within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made" (e).

The statute, however, contains a proviso, that the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any of the parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible (f).

All the plaintiff, therefore, has to do, is to prove that the right of common claimed by him, has been exercised for the thirty or sixty years above mentioned, by himself or those who preceded him in the occupation of the land in right of which he claims.

In the first place, he must prove the repeated user of the *locus in quo*, as a common, for his commonable cattle. Formerly this must have been proved to the same extent as laid, otherwise the plaintiff would have failed in his action altogether. But now, by R. G. H. 4 W. 4, pt. 1, ss. 5 & 6, if a right of common of pasture for divers kinds of cattle, as for example, horses, sheep, oxen, and cows, be pleaded, and issue is taken

(c) 2 & 3 W. 4, c. 71, s. 1.

(d) Id. s. 6.

(e) Id. s. 4.

(f) Id. s. 7. See *Clayton v. Corby*, 2 Q. B. 813.

thereon;—if a right of common for some particular kind of these commonable cattle only be found by the jury, a verdict shall pass for the plaintiff in respect of the right of common so found, and for the defendant in respect of the residue. But if the party claim less than it appears in evidence he is entitled to (*g*), as if he claim common for sheep, and it appear in evidence that he is entitled to common for sheep and cows (*h*), it will be sufficient. So, where the declaration stated a right of common for all commonable cattle, and it was proved that the plaintiff turned on all the commonable cattle he had, but that he had no sheep: it was holden that the variance was immaterial (*i*). So, an allegation of a right of common for all the plaintiff's cattle, levant and couchant, may be supported, although it appear from the evidence that the common is not sufficient to feed all the cattle for any length of time (*h*). Where the claim was of common for all the plaintiff's commonable cattle, levant and couchant, and the evidence was a lease of the farm, "with all reasonable common of pasture for the said farm and premises on," &c.: the court held it to be sufficient, as both meant the same thing (*l*). So, if there be any variance between the declaration and evidence as to the number of acres, &c., by reason of which the right is claimed, it seems to be immaterial; and, therefore, where a declaration stated the plaintiff to be seised of sixty acres of meadow, &c., and entitled, in respect of them, to a right of common, and the jury found a right of common in respect of thirty acres, it was holden sufficient (*m*). So, a right claimed in respect of a messuage and twenty acres, may be supported by evidence of a right in respect of a messuage and eighteen acres only (*n*). So, a claim in respect of a messuage and land may be supported by evidence of a right of common by reason of the party's possession of land only (*o*).

2. The defendant must prove his right for cattle levant and couchant, by proving that he has land upon which they may be levant and couchant (*p*), that is to say, land which can keep them during the winter (*q*). And if the right be laid in respect of a messuage or cottage, still at the trial the levancy and couchancy must be proved (*r*); for common for cattle levant and couchant cannot be claimed as appurtenant to a house,

(*g*) *Bailiffs of Tenchesbury v. Bricknell*, 1 Taunt. 143.

(*h*) *Bushwood v. Pond*, Cro. El. 729.

(*i*) *Manifold v. Pennington*, 4 B. & C. 161.

(*h*) *Willis v. Ward*, 2 Chit. 207.

(*l*) *Doidge v. Carpenter et al.*, 6 M. & S. 47.

(*m*) *Palm*, 209. Cro. Jac. 629.

(*n*) Cro. El. 531.

(*o*) *Ricketts v. Salway*, 2 B. & A. 300.

(*p*) *Scholes v. Hargreaves*, 5 T. R. 46.

(*q*) *Id.*, *Leech v. Widsley*, 1 Vent. 54.

Patrick v. Lowre, 2 Brownl. 101.

Whitelock v. Hutchinson, 2 Moody & R. 205.

(*r*) 1 Saund. 346, c. (n.)

without any curtilage or land (*s*). And the cattle must appear to be the defendant's own; at least he must have a special property in them (*t*); and they must appear to be commonable cattle.

3. If the defendant, by his plea, claim a right of common "every year at all times of the year," he should prove it as laid. Formerly a variance in this respect, between the declaration and evidence, would be fatal; but now, it should seem that the plea would be taken distributively, under R. G. H. 4 W. 4, pt. 1, s. 6, already mentioned (*ante*, p. 338); and that if the defendant proved a right for a part of the year only, he should have a verdict as to that, and the plaintiff a verdict for any trespass committed at any other part of the year. Where common was thus claimed "at all times of the year," and it was proved that the party had a right to put his cattle upon the common every day in the year, but that a neighbouring farmer had a right by prescription to have all the sheep upon the common folded upon his farm at night; the court at first thought the variance fatal, but afterwards they held that the words "at all times" might be taken to mean the usual times of feeding sheep, and sheep were seldom allowed to remain on the common at night (*u*).

4. He must prove a constant exercise, without interruption, (that is to say, without an adverse interruption (*r*),) of this right of common, for thirty or sixty years, as pleaded; no presumption of right shall be made in favour of any claim, upon proof of the exercise of the right claimed for a less period (*w*). Therefore, where an uninterrupted enjoyment for twenty-eight years was proved, but for some years before that time a stang or rail had been thrown across, which prevented the access of the party's cattle to the *locus in quo*: it was holden that this was not sufficient (*x*). But where the claim was of the sole and several pasture in 217 acres, and it was proved that the party was interrupted in the exercise of this right, within the last thirty years, in about thirty acres of this land, by the same being built upon, but that he had not been so interrupted in that part where the trespass was alleged and proved to have been committed: this interruption with respect to the thirty acres was holden not to affect his right as to the residue (*y*). And the proof should be of an uninterrupted

(*s*) *Scholes v. Hargreaves*, 5 T. R. 46. And see *Benson v. Chester*, 8 T. R. 396. *Say's case*, March, 83, pl. 37. *Chudley v. Miller*, 1 Sid. 313. *Weskly v. Wildman*, 1 Ld. Raym. 406, per Levinz. arg.

(*t*) Bro. Common, pl. 47. *Mananten v. Trevilian*, 2 Show. 328.

(*u*) *Brook v. Willett*, 2 H. Bl. 224.

(*v*) *Carr v. Foster et al.*, 3 Q. B. 581.

(*w*) 2 & 3 W. 4, c. 71, ss. 1, 6, *ante*, pp. 337, 338.

(*x*) *Bailey v. Appleyard*, 8 Ad. & El. 161.

(*y*) *Welcome v. Upton*, 6 Mees. & W. 536, 540, per Parke and Alderson, BB.

exercise of the right for the thirty years next before the commencement of the action; and it should be so pleaded, otherwise the plea will be bad on special demurrer (z). But this must be reckoned as excluding the time that the person, who might have resisted the claim, is a tenant for life, *feme covert*, lunatic, &c., as mentioned in the seventh section of the statute, *ante*, p. 338; and therefore proof of an enjoyment of the right from 1761 to 1785, when a life estate intervened, which lasted until 1834, and then an enjoyment from that time until 1840, when the action commenced,—this was holden sufficient (a). Where the right was claimed by prescription, it was holden to be disproved by evidence of a grant of it to the party's ancestor, by deed, eighty-one years before, for a valuable consideration (b).

Special Pleas.

Instead of thus traversing the right, the defendant, in his plea, may confess and avoid it. And by stat. 2 & 3 Will. 4, c. 71, s. 5, if the defendant shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned (c), or any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation (d).

And therefore the defendant may plead a right of common in the place mentioned, for his own cattle, levant and couchant (e); in which case the plaintiff must new assign, if he intend to prove a surcharge (f). And it will be no answer to a complaint of surcharging the common, that the plaintiff also did the same (g). The plea is in the same form as a plea of right of common in trespass (h).

So, the defendant may plead a licence from the lord, alleging that sufficient common was left for the commoners (i).

Or the plaintiff may plead the statute of limitations, 3 & 4 W. 4, c. 27, s. 2, and the defendant may thereupon reply, and the plaintiff rejoin, &c., until issue shall be joined on some single point. See a set of pleadings of this description in

(z) *Richards v. Fry*, 7 Ad. & El. 698.

(a) *Clayton v. Corby*, 2 Q. B. 813.

(b) *Walsome v. Upton*, 5 Mees. & W. 398. See S. C. *supra*, 6 Mees. & W. 536.

(c) See sects. 1 & 7, *ante*, pp. 337, 338.

(d) See *Arlett v. Ellis et al.*, 7 B. & C. 346, before this statute, and

Tapley v. Wainwright, 5 B. & Ad. 395, since.

(e) See *Bowen v. Jenkins*, 6 Ad. & El. 911.

(f) *Id.*

(g) *Hobson v. Todd*, 4 T. R. 71.

(h) See 1 Arch. *Nisi Prius*, 2 Ed. p. 440.

(i) See *Smith v. Fevrell*, 2 Mod. 6.

Holmes v. Newlands, 11 Ad. & El. 44; 9 Law J. 19, qb.; *Newlands v. Holmes*, 3 Q. B. 679; and see *Kavanagh v. Gudge et al.*, 5 Man. & Gr. 726.

SECTION II.

The Tenant's Remedy against the Lord, for Disturbance of Common.

If the lord inclose the common, or part of it, without leaving sufficient for the commoners, or if he plough it up, or erect a rabbit warren in it, or the like, whereby the commoner is disturbed in the enjoyment of the common, the commoner may have his remedy by action on the case against the lord (*h*). He cannot in general right himself by any act of his own. If, for instance, the lord plant trees on the common, so that the commoner thereby cannot have his common so beneficially as he ought,—he cannot cut them down, for they are part of the soil itself, being the fruit and produce of the soil,—but his remedy is by action on the case (*i*). So, if the lord's rabbits on a common increase so much that there is not a sufficiency of common left, a commoner cannot fill up the coney burrows, for it would be a meddling with the soil, and a judging for himself; he must have recourse to his action on the case against the lord (*k*). Much less can a commoner kill the rabbits, to prevent their increase to the prejudice of the common (*l*). It is the policy of the law not to allow commoners to abate, except in some few cases, which shall be presently mentioned; the abater acts as a judge in his own cause, and this should seldom be permitted (*m*).

The cases in which the law allows of abatement by a commoner, as against the lord, are, where the acts of the lord are directly contrary to the nature of the common; for, by the grant of it, the grantor gives every thing which is incident to the enjoyment of the grant, such as free ingress, egress, &c. Therefore if the lord erect a wall, gate, hedge or fence around the common, to prevent, or which has the effect of preventing, the commoners' cattle from going upon it, the commoners may abate the erection, because it is inconsistent with the terms of the grant (*n*). It is said that if this wall, &c. be erected upon the common, the commoner may abate the whole; if on land which is no part of the common, but surrounds it, they can

(*h*) See *Patrick v. Stubbs*, 9 Mees. & W. 830.

(*i*) *Sadgrove v. Kerby*, 6 T. R. 483, affirmed in error, 1 B. & P. 13.

(*k*) *Cooper v. Marshall*, 1 Burr. 259, 2 Wils. 51.

(*l*) *Hodson v. Grissel*, Cro. Jac. 195. Yelv. 104. 1 Ro. Abr. 405.

(*m*) 1 Saund. 353, a.

(*n*) *Cooper v. Marshall*, 1 Burr. 259. *Sadgrove v. Kerby*, 6 T. R. 483.

abate only so much of the wall, &c. as may be necessary to make a way for their cattle to go into the common (o). Still, as the lord may approve, leaving a sufficiency of common for the commoners, the latter, in exercising this right of abatement, do so at the peril of being punished in an action of trespass, if the lord have left a sufficiency of common for them (p). So the lord may licence another to do an act, which may in some degree injure the common, provided a sufficiency of common be left for the commoners (q), and the commoners cannot interfere to prevent it.

But if a stranger, without authority, make any erection upon the common, the commoners may abate it, whether a sufficiency of common be left or not, provided they do so before the party has acquired a right, by the length of time he has occupied, within the statute of limitations, 3 & 4 W. 4, c. 27.

CHAPTER III.

Rights and Liabilities of Outgoing Tenants.

As to crops growing.] In what cases a tenant, at the end of his term, is entitled to the crops then growing upon the farm, as emblements, has been fully considered, *ante*, p. 324. But in cases where he is not so entitled, as in tenancies for a term of years certain, any crops which are sown in the last year of the tenancy, and not severed before the expiration of the term, belong in strictness to the landlord. This would be a great discouragement to tenants to cultivate their farms properly in the last year of their tenancy, (as it could not be expected that they would sow crops for others to reap them,) were it not that they are generally secured a proper remuneration for their labour and expenses in doing so, either by express stipulation in their leases, or by the custom of the country. These stipulations, and the several customs prevailing in different parts of the country, vary so much, that it would be absurd to attempt to deduce from them any general rule: by some, the outgoing tenant is allowed to take away all the crops he has sown, and which are usually termed his 'way-going crop; by others, only a certain part of the crops, such as a half, or a third; by others, he is not only entitled to the whole of the

(o) 15 H. 7, 10, 18. 20 Ed. 3, 6.
2 Inst. 88. *Mason v. Caesar*, 2 Mod.
65.

(p) 1 Saund. 353 a, b.

(q) See *Greenhow v. Illey*,
Willes, 619. *Smith v. Feverel*, 2
Mod. 6.

crops, but to the use of the barns, &c. on the farm, for the purpose of threshing them, and preparing them for market; by some, the landlord shall have the crops at a stipulated price per acre, or at a price to be fixed by certain valuers; by others the incoming tenant shall have them at a valuation. Whatever the express stipulation between the parties, or the custom of the country may be upon the subject, that must determine the tenant's right; if there be neither, the crops which are in the ground, or not severed, at the end of the term, belong to the landlord (*r*). Sometimes there is not only a custom of the country, but also an express covenant or stipulation between the parties, upon the subject of the crops which shall be growing on a farm at the end of the tenancy; and in such case, the covenant or stipulation shall supersede the custom of the country, so far as it is repugnant to, or inconsistent with it, and the parties shall be bound by the former, and not by the latter (*s*). But if the custom of the country be consistent with the terms of the agreement between the parties, then the custom is deemed to be engrafted upon it, and to form part of it, as fully as if it were therein expressly stated (*t*). Where the custom of the country was, that if a tenant sowed wheat on a fallow, in the last year of his tenancy, he was entitled to take two-thirds of it as a 'way-going crop; but if he sowed wheat after turnips, he was entitled to half; and a tenant in the last year of his tenancy, sowed wheat after turnips, which was contrary to an express stipulation in his lease, by which wheat was to be sown on a fallow, and well manured: the court held that there was nothing inconsistent in this; the stipulation regulated the sowing of the crop during the tenancy, the custom established the right of the tenant after the tenancy was at an end; and if the tenant had been guilty of any breach of the stipulation, the landlord had his remedy by action (*u*). So, where the custom of the country was, that the tenant of a farm, cultivating it according to the course of good husbandry, was entitled, on quitting, to receive from the landlord or incoming tenant a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and was bound to leave the manure for the landlord, if he would purchase it,—this was holden not to be superseded by a stipulation in the lease that the tenant would consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be so spread, on receiving a reasonable price for

(*r*) *Caldecott v. Smythies*, 7 Car. & P. 808.

(*s*) See *Clarke v. Roystone*, 14 Law J. 143, ex. *Roberts v. Barker*, 1 Cr. & M. 808. *Liebenrood v.*

Vines, 1 Meriv. 7. See *Faviell v. Gaskoin et al.*, 21 Law J. 85, ex.

(*t*) *Senior v. Armytage*, Holt. 197.

(*u*) *Holding v. Pigott*, 7 Bing. 465.

it (v). And such customs are deemed reasonable, and therefore valid and binding on the parties. Where the custom was for the off-going tenant to bestow his work, labour and expense, in manuring, tilling, fallowing and sowing the land, according to the course of good husbandry, and if he should quit the farm without receiving the benefit of the same, the landlord should make him a reasonable compensation for it: this was holden to be a reasonable and valid custom (w). So a custom that a tenant, who is bound to use and cultivate his farm according to the rules of good husbandry and the custom of the country, should be entitled, on quitting the farm, to charge his landlord with a certain portion of the expense of the necessary drainage of the farm, although done without his landlord's consent or knowledge—was holden reasonable (x). But where the custom is for the tenant, in the last year of his tenancy, to crop the land in a particular way; as for instance, to crop one-third of the arable land with wheat, and to reap that wheat after the tenancy has expired;—if the tenant crop more than one-third, the landlord will be entitled to the excess (y). Where the custom was, that the off-going tenant was entitled to two-thirds of the crops on the land at the end of the tenancy, but he was to cut the whole, and keep the fences in repair until it was cut and carried away: it was holden that the effect of such custom was to vest the possession of the land, on which the crops were growing, in the tenant, until such crops should be cut and removed (z). But where the custom or agreement is, that the landlord or incoming tenant shall have the crops at a valuation, it has no such effect; all the tenant can claim is, a right to go upon the land to improve the crop whilst it is growing (a).

Where the right to the 'way-going crop is matter of stipulation between the parties, the only questions that can arise, will be, as to the construction to be given to the particular covenant or stipulation. It is unnecessary therefore to notice this part of our subject further.

As to straw, hay, manure, &c.] All the straw, hay, manure, corn severed, dead and live stock,—every personal chattel,—upon the farm, at the expiration of the tenancy, belongs to the tenant, and may be removed by him, unless there be some custom of the country, or some express stipulation between

(v) *Hutton v. Warren*, 1 Mee. & W. 466.

(w) *Dalby v. Hirst*, 1 Brod. & B. 224.

(x) *Mousley v. Ludlam*, 21 Law J. 64, qb.

(y) *Caldecott v. Smythies*, 7 Car. & P. 808.

(z) *Griffiths et al. v. Puleston*, 13 Mee. & W. 358. 14 Law J. 33, ex.

(a) *Strickland v. Maxwell*, 2 Cr. & M. 530.

him and his landlord to the contrary. If there be both custom and stipulation upon the subject, then the stipulation shall supersede the custom, so far as it is repugnant to or inconsistent with it, and the parties shall be bound by the former, and not by the latter. And therefore where a tenant held under the terms of an expired lease, by which it was stipulated that the tenant, on quitting the farm, should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant,—but the lease contained no stipulation for payment for the manure; by the custom of the country, the defendant was bound not to sell or take away the manure in the fold, but to leave it to be expended on the farm by the landlord or the succeeding tenant, and he would be entitled to payment for it: it was holden that as the express stipulation made no mention of payment for the manure, the tenant was not entitled to any, the express stipulation having altogether excluded the custom (*a*). So, where by the custom of the country the outgoing tenant would be entitled to a certain allowance for foldage; but the lease, under which he had holden, specified certain payments to be made by the incoming to the outgoing tenant, among which this payment for foldage was not included: the court, upon a consideration of the whole of the lease, held that the defendant had thereby waived the benefit he might otherwise have derived from the custom (*b*).

Where the right of the tenant to take straw, hay, manure, &c., off the farm, at the end of the tenancy, is thus controlled by some covenant or stipulation upon the subject between the parties, the only question that can well arise upon it is, as to the construction to be put upon the covenant or stipulation. It is scarcely necessary, therefore, to notice this matter further. Where a tenant had entered into a bond, conditioned to put and spread all the manure and compost then collected in the middenstead, or on any other part of the farm, and that he should not sell, cart or convey away any dung, compost or manure from the farm; and at a sale of the tenant's stock, J. Z., the tenant of an adjoining farm, bought two cows, and by the tenant's permission left them on the tenant's farm for some weeks, bringing provender from his own farm to feed them: it was holden that the manure made by these cows, between the time of sale and their removal, was manure made on the farm, and that the removal of it by J. Z. was a breach of the condition of the bond, and subjected the tenant to an action (*c*). Where the outgoing tenant had covenanted with

(*a*) *Roberts v. Barker*, 1 Cr. & M. 808. And see *Clarke v. Roy-stone*, 14 Law J. 143, ex.

(*b*) *Webb v. Plummer*, 2 B. & A. 746.

(*c*) *Hindle v. Pollitt*, 6 Mees. & W. 529.

his landlord to leave the manure upon the farm, and to sell it to the incoming tenant at a valuation to be made by certain persons; and after the tenant quitted the farm, the incoming tenant removed and used the manure without his consent, and before any valuation had been made of it: it was holden that the outgone tenant might maintain trespass against him; the effect of the covenant was to give the outgone tenant a right of onstand for his manure upon the farm, until he could sell it to the incoming tenant, and the property in the manure remained in him in the mean time, and his possession must be deemed to have continued up to the time of its removal; and therefore trespass well lay (*d*).

As to the right of the tenant to farm fixtures, &c., see *post*, p. 358.

As to tithe rent charge.] By stat. 14 & 15 Vict. c. 25, s. 4, if any occupying tenant of land shall quit, leaving unpaid any tithe rent charge for or charged upon such land which he was by the terms of his tenancy or holding legally or equitably liable to pay, and the tithe owner shall give or have given notice of proceeding by distress upon the land for recovery thereof, it shall be lawful for the landlord, or the succeeding tenant or occupier, to pay such tithe rent charge, and any expenses incident thereto, and to recover the amount or sum of money which he may so pay over against such first-named tenant or occupier, or his legal representatives, in the same manner as if the same were a debt by simple contract, due from such first-named tenant or occupier to the landlord or tenant making such payment.

(*d*) *Beaty v. Gibbons*, 16 East, 116.

PART VI.

FIXTURES.

- SECT. 1. *Landlord's Fixtures.*
2. *Tenant's Fixtures.*
3. *Trade Fixtures.*
4. *Farm Fixtures.*
5. *Right to them by Representatives.*
6. *Actions relating to them.*
-

SECTION I.

Landlord's Fixtures.

Fixtures, or things fixed to the freehold, at the commencement of the tenancy, belong, without exception, to the landlord, just as much as the land or house demised (*a*). And if the tenant remove them, he is guilty of waste, and the landlord may have his remedy accordingly (*b*). If he take the glass out of the windows, or remove the wainscot, whether fixed with great or small nails, or screws, to the posts or walls of the house,—it is waste, and he is answerable for it as such (*c*). And the same as to benches, doors, furnaces, and the like, annexed or fixed to the house, and which are deemed part and parcel of the house itself (*d*). And where the owner of a mill let it to a tenant for a term, and the tenant clandestinely, and without the permission of his landlord, dismantled the mill of its machinery; the machinery, on being removed, was seized by the sheriff under a *fieri facias* against the tenant, and by the sheriff sold to a *bonâ fide* purchaser: it was holden that the landlord might maintain trover against the purchaser

(*a*) 4 Co. 63 b. Co. Lit. 53. a.

(*b*) See *ante*, pp. 201, 207.

(*c*) 4 Co. 63 b, 64.

(*d*) Co. Lit. 53. a.

for the machinery, although the tenant's term were unexpired (*i*).

So, all fixtures, or things fixed to the freehold, fixed by the landlord during the tenancy, are in like manner the property of the landlord; and if the tenant remove them during the term he will be guilty of waste.

So, all fixtures, or things fixed to the freehold, which have been affixed by the tenant during the term, thereby become the property of the landlord (*k*), if they be not what are termed tenant's fixtures, or trade fixtures; and if the tenant remove them he is guilty of waste (*l*).

So, all fixtures, or things fixed to the freehold, which remain so affixed at the expiration of the term, or sooner determination of the tenancy, become the property of the landlord, whether they be landlord's fixtures, or tenant's fixtures, or trade fixtures,—unless the tenant remove them, either before the determination of the tenancy, or before such further time as the tenant is allowed to retain possession, under circumstances which warrant him in considering himself still as tenant (*m*). And if after that time the tenant, or any person representing him, remove them, he is liable to an action. Holt, C.J., in *Poole's case*, 1 Salk. 368, laid it down as a rule, that if a trade fixture, for instance, a soap-boiler's vat, erected by a tenant for the purposes of his trade, be allowed to remain until the end of the term, it becomes the property of the landlord, and cannot be removed by the tenant, or sold by the sheriff under an execution against him; but this must now be understood with the above qualification, namely, that the tenant had the right of removing them, as long as he is allowed to remain in possession. Thus, where a tenant's fixtures, namely, bells erected by a tenant during his tenancy, at his own expense, were allowed to remain until after the end of the term, and after he himself had quitted possession, it was holden that they became the property of the landlord; and the landlord having severed them from the freehold, after the tenant had quitted possession, the latter brought an action of trover for them; but it was holden that the action would not lie (*n*). So, if the tenancy be determined before the end of the term, by forfeiture and power of re-entry, and the landlord thereupon re-enter, all fixtures then fixed to the freehold become the property of the landlord, and the tenant or those who represent him cannot remove them. Therefore, where the term was forfeited by the bankruptcy of the tenant, according to a proviso in the lease, and the landlord entered upon the assignees,

(*i*) *Farrant v. Thompson*, 5 B. & A. 826.

(*k*) 4 Co. 64.

(*l*) *Id.*

(*m*) See *Ruffey v. Henderson*, 21 Law J. 49, qb.

(*n*) *Lyde v. Russell*, 1 B. & Ad. 394.

to enforce the forfeiture ; and in about three weeks afterwards, the assignees, still continuing in possession, removed and sold a fixture, namely, a steam-boiler, which had been fixed to the freehold by the tenant, for the purposes of his trade ; and upon the trial of an action of trover, brought for it by the landlord, the jury found that it had not been removed within a reasonable time after the landlord's entry ; the court held that the landlord had a right to recover ; the rule to be collected from the cases upon the subject is, that the tenant's right to remove the fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant ; but here the assignees could not consider themselves or the bankrupt as tenants, for the landlord had actually entered, and was possessed ; and even if, where the tenancy is determined by the act of a third party, they had a right to a reasonable time for the removal of this fixture, the jury had found that they had not availed themselves of that privilege (o). But bringing an ejectment for a forfeiture, or upon the expiration of the term by effluxion of time, is not, it should seem, equivalent in this case to the actual entry of the lessor ; for where a tenancy from year to year had been determined by a notice to quit, and an ejectment was brought by the lessor, and judgment actually obtained, but not executed, the court held that the tenant had a right to remove trade fixtures, after judgment, and whilst he was allowed to remain in possession (p). Where, however, steam-engines and other machinery for the working of a colliery were erected by a tenant, and he assigned his lease, with the engines and machinery, to trustees, as a security for an annuity he had granted ; and the landlord afterwards brought an ejectment upon a proviso in the lease for re-entry for a forfeiture, and recovered, and obtained possession ; after which, the sheriff seized the steam-engines and machinery under a *fiery facias* against the tenant : the trustees having brought trover for them, it was holden that they could not recover ; the steam-engines and machinery being fixed to the freehold, passed to the landlord upon his re-entry, and the trustees no longer had any property in them (q). Also, where a landlord, after the expiration of a notice to quit, brought an ejectment against his tenant, and an agreement was then entered into between them, that judgment should be signed, but that execution should be stayed for six months, during which time the tenant might retain the possession : the court held that the fair meaning of this

(o) *Weeton et al. v. Woodcock et al.*, 7 Mees. & W. 14.

(q) *Minshall v. Lloyd*, 2 Mees. & W. 430 ; and see *R. v. Topping*, M'Clel. & Y. 544.

(p) *Penton v. Robart*, 2 East, 88.

agreement (although not expressed) was, that the tenant was to do no act in the mean time to alter the premises, but that he was to deliver them up at the end of the six months in the same state as when the agreement was made, and the judgment signed; and that the tenant having removed some tenant's fixtures, after the agreement and judgment, which during his term he might lawfully have removed, the landlord might maintain an action on the case in the nature of waste against him (z).

SECTION II.

Tenant's Fixtures.

As to matters of mere ornament, such as hangings, chimney glasses, pier glasses, and the like, which are merely fastened up to keep them in their places, these are not deemed to be fixed to the freehold (a); the lessee is entitled to them at all times before or after the end of his term, and they never vest in the lessor.

Also, all fixtures and things fixed to the freehold by the tenant during his tenancy, which are ornamental, and may be removed without doing substantial injury to the freehold,—the tenant may remove at any time during his term (b). And these are what are properly called tenant's fixtures. In Viner's Abridgment, the rule is laid down much more largely, namely, that "Things set up to complete a house, as hearths and chimney-pieces, are removable; per Holt, Ch. J., 1 Salk. 368, *Poole's case*" (c). And some writers upon the subject have cited this passage as an authority for the proposition laid down in it. But this is a mistake; in the case as reported in Salkeld, the dictum of Holt, C.J., is directly the reverse of what is here stated; after laying it down as a rule of law, that fixtures erected by tenants for the purposes of their trade, such as vats for soap-boilers, &c., were removable by the tenant during the term, he then stated that there is a difference between such things and what a tenant does to complete a house, as hearths and chimney-pieces, which he held not to be removable (d). Chimney-pieces, if ornamental, and may be removed without substantial injury to the free-

(z) *Fitzherbert v. Shaw*, 1 H. Bl. 258. *Heap v. Barton et al.*, 21 Law J. 153, cp.

(a) *Beck v. Rebow*, 1 P. Wms. 94.

(b) See *Avery v. Cheslyn*, 3 Ad. & El. 75.

(c) 15 Vin. Abr. Landlord. and Tenant, pl. 5.

(d) *Poole's case*, 1 Salk. 368.

hold, are removable; but otherwise not (e). And the same, perhaps, as to stoves and other fixtures, if ornamental, &c. Bells also seem to be tenant's fixtures (f). And a pump, fixed to an upright plank, and which plank was fixed to a wall, at a distance of about four inches from it, by an iron bolt or pin, which passed through the wall,—has been holden to be removable by the tenant who erected it, the court saying that the rule as between landlord and tenant had been very much relaxed in modern times (g); but in that case the pump could hardly be called a fixture. This must not, however, be confounded with the case of the common and ordinary contract between the outgoing and incoming tenant, as to the sale and purchase of the fixtures of a house, &c., at a valuation. That fixtures are very usually thus sold by the outgoing to the incoming tenant, is a fact familiar to all persons at all conversant with the ordinary mode of letting houses throughout the kingdom. And from this circumstance it has been assumed by some writers, that articles of general utility and domestic convenience, such as stoves, grates, kitchen ranges, coppers, &c., which the tenant may have affixed to the freehold during his term, are exempted by some rule of the common law from the general principle laid down by all the authorities, that all things fixed to the freehold are parcel of the freehold, and belong to the owner of it. I believe it will be found that no such rule of exemption exists beyond that relating to mere matters of ornament, and which has been already mentioned. If the decision of Lord Holt, in Poole's case, *supra*, is to be depended upon, (and it has been deemed and recognized as a leading authority in every case which has been since decided upon the subject,) if a tenant complete the house demised, by putting up the ordinary fixtures, such as hearths and chimney-pieces, these fixtures belong, not to the tenant, but to the landlord. And the same, of course, if the tenant put them up at any time during his term. So, if a tenant take down any fixture, thus belonging to the landlord, and substitute any other for it, *a fortiori* would it belong to the landlord. So, if instead of the tenant putting such fixtures in, the landlord had done so, in that case, of course, they would belong to the landlord. It therefore appears that there is no conceivable case, where such ordinary fixtures can be the property of the tenant, and be removable by him, by any rule of the common law; nor can they become his property, unless made so by some contract between him and his landlord. But it seems to me that the custom may be accounted for, by as-

(e) *Leach v. Thomas*, 7 Car. & P. 328.

(f) See *Lyde v. Russell*, 1 B. & Ad. 394; *ante*, p. 350.

(g) *Grymes v. Bowren*, 6 Bing. 437.

suming that in building the house, or immediately after it, the landlord added these ordinary fixtures ; and afterwards, in letting the house, obliged the tenant to purchase them, either at a stipulated price, or by valuation. They thus become the property of the tenant, and he might sever them, and reduce them to their original state of personal chattels, at any time during his tenancy ; but if he gave up possession of the demised premises, without removing the fixtures, they then again became the property of the landlord. And as, at the end of a term, it is obviously the interest of the landlord that the premises should not be deteriorated in appearance, by the removal of the fixtures, there is in general no difficulty in obtaining his consent to their remaining fixed, without prejudice to the outgoing tenant's right to remove them, if the incoming tenant shall not purchase them at a valuation. If the incoming tenant purchase them, then he has the same right his vendor had ; and so the fixtures may be handed down from outgoing to incoming tenant, through a long series of lettings of the premises containing them. In this way the present custom may be accounted for,—a custom having no validity as such, but merely deriving it from the contract from which it originated. But there seems to be no rule of the common law which makes them the property of the tenant, or allows of their removal without the consent of the landlord. So, buildings or other erections, fixed to the freehold, can never be considered tenant's fixtures. And where a conservatory was erected on a foundation of brick and mortar fifteen inches deep, and attached to the dwelling-house by eight cantilivers, let in nine inches into the wall of the house, and which bore the rafters of the conservatory ; on the foundation was imbedded a sill, and on the sill was erected the frame-work, which was covered with slates ; the conservatory was paved with Portland stone, connected with the parlour chimney by a flue, and two doors from the house opened into it, one from the dining-room, the other from the library : the tenant becoming bankrupt, his assignees removed and sold this conservatory, and thereupon the lessor commenced an action on the case as for waste against them ; and for the assignees it was contended that as this was matter of ornament, the lessee, who had erected it, might have removed it, and the assignees of course had the same right ; but the court were clearly of opinion that neither the tenant nor his assignees had any such right ; no decided case or other authority had ever extended the exemption in favour of tenant's fixtures so far (*h*). So, where a tenant, not a gardener by trade, claimed the right of removing a border of box, which had been planted by himself

(*h*) *Buckland v. Butterfield et al.*, 2 Brod. & B. 54.

on the demised premises; it was holden that he could not legally do so, unless there were some stipulation in the agreement between him and his landlord to that effect (*i*). But posts and rails have been holden to be removable (*k*); so, a wooden stable standing on blocks or rollers, has been holden to be removable (*l*); but this latter in fact was not a fixture.

The exemption of tenant's fixtures from the general rule of law as things fixed to the freehold, may be enlarged or controlled by express stipulation between the parties: if by the lease, the tenant, at the determination of his tenancy, may remove all things which he may have fixed to the demised premises during his tenancy, of course he may do so; and on the other hand, his common law right may be narrowed, or altogether taken from him, by the express terms of the demise. And in all cases where the express terms of the lease or agreement between the parties, add to or lessen the common law rights of either party, the lease or agreement shall be deemed to supersede and exclude the rule of the common law upon the subject, so far as the one is inconsistent or incompatible with the other. Where the tenant covenanted to yield up, at the expiration of the term, all erections and improvements erected, made or set up during the term,—this covenant was holden to be broken by the removal of the sashes and framework of a greenhouse erected by the tenant during the term, the framework of which was laid and embedded in mortar on walls built for the purpose of receiving it (*m*). In this last case, which was an action of covenant by the executors of the lessor, for breach of the above covenant, the defendant pleaded that it was agreed between him and the lessor, that if he the defendant would erect such a greenhouse, he should be at liberty to take it down and remove it at the end of his term, provided no injury should thereby be done to the premises, and that he, confiding in the promise of the lessor, erected the greenhouse accordingly, and at the end of the term removed the sashes and framework of it, doing no injury thereby to the premises: this plea was holden bad, on a motion for judgment *non obstante veredicto*, for the verbal consent of the lessor could be no answer to a breach of a covenant under seal (*n*). So, a covenant to keep in repair the premises demised, and all erections, buildings and improvements erected thereon during the term, and yield up the same so repaired, &c. at the end of the term,—was holden to be broken, by the removal of a veranda, erected during the term, the lower part of which was affixed to the ground by means of posts (*o*).

(*i*) *Empson v. Soden*, 4 B. & Ad. 655.

(*k*) *Fitzherbert v. Shaw*, 1 H. Bl. 258.

(*l*) *Id.*

(*m*) *West v. Blakeney*, 2 Man. & Gr. 729.

(*n*) *Id.*

(*o*) *Peury v. Brown*, 2 Stark. 403.

SECTION III.

Trade Fixtures.

Trade fixtures, or things fixed to the freehold by the tenant for the purposes of his trade, during his term, are exceptions to the general rule, that all things fixed to the freehold are to be deemed parcel thereof, and vest in the landlord. Thus vats erected by a soap-boiler during his tenancy, though fixed to the freehold, have been holden to belong to him as tenant, and to be removable by him; and where such a vat was seized by the sheriff, and removed and sold, under a *feri facias* against the tenant, and the landlord brought an action on the case against the sheriff, Holt, C. J., held that the action would not lie: the tenant, by the common law, independently of all custom of trade, might remove the vats fixed to the freehold by him for the purposes of his trade; and whatever he could remove, the sheriff might seize and sell under the writ (a). So, machinery, set up by the tenant, though fixed to the freehold, may be removed by the tenant, or by his assignees if he become bankrupt (b). Even where a tenant erected, upon a brick foundation, let into the ground, and with a brick chimney belonging to it, a superstructure of wood, which he had brought from another place, where he had carried on the business of a varnish maker, and in this wooden building the tenant manufactured his varnish: it was holden that he had a right to remove it at any time during his possession as tenant (c). And where a windmill was of wood, with a brick foundation, but the wood work was not inserted into the brick foundation, but merely rested upon it by its own weight alone, and no part of the machinery touched either the foundation or the ground: this was holden not to be affixed to the freehold at all, or parcel of it (d). So, where certain upright shafts, called jibs, worked in sockets above and below (called caps and steps) set in timber which was fixed to the freehold, but the jibs could be easily removed without doing any injury to the freehold: these were holden not to be fixtures, and that the tenant was entitled to them, and might maintain trover for them, even after the expiration of his term, and after he had quitted possession (e). But if the machinery, &c., used by the tenant for the purposes of his trade, have not been set up by him, but by his landlord or a former tenant, he has of course no right to remove them,

(a) *Poole's case*, 1 Salk. 368.(b) *Trappes v. Harter*, 2 Cr. & M. 153.(c) *Penton v. Robart*, 2 East, 88.(d) *R. v. Otley*, 1 B. & Ad. 161.(e) *Davies et al. v. Jones et al.*, 2 B. & A. 165.

nor can they be taken in execution at the suit of any of his creditors (*f*). So where a windmill of wood, on a brick foundation, was mortgaged by the occupier, it was holden that it could not be taken in execution at the suit of one of his creditors (*g*).

This exemption of trade fixtures from the general rule already mentioned as to things fixed to the freehold, may be materially affected by any express contract between the parties. Where the lease contained a covenant to yield up in repair, at the expiration of the lease, all buildings which should be erected on the demised premises during the term,—this was holden to include buildings erected by the tenant for the use of his trade, if let into the soil, or otherwise fixed to the freehold, but not those which rested merely on blocks or pattens (*h*). And where the lease of a mill contained a covenant on the part of the lessee, to deliver up the premises at the end of the term in good repair, together with all “locks, bolts, bars, and all other fixtures, fastenings and improvements,” which should at any time during the term be erected, set up, or fixed upon the premises,—it was holden that millstones, which the tenant had set up, were “improvements” within the meaning of the covenant, and therefore could not be removed by him at the end of the term; although were it not for the covenant it would have been otherwise (*i*). So, where a lease was granted of a piece of ground for a term of years, and the lessee built two lime kilns upon it, for the purposes of his trade as a lime burner; and afterwards and during the term, the lessee took a new lease of the premises, and of the wharfs and buildings erected and built thereon, in which lease he covenanted to repair, uphold and maintain the piece of ground, erections and buildings, wharfs, cranes and ponds, and the hedges, &c., belonging to the premises, and the said premises, so repaired, upheld and maintained, to leave and yield up at the end of the term; about four years before the expiration of the second term, the tenant pulled down the lime kilns, and after the end of the term, the landlord brought an action of covenant against him for doing so; the court held that, supposing these lime kilns were buildings which might have been removed by the tenant, independently of the covenant in the second lease, (and which was doubtful,) yet as he had, after building them, accepted a lease of the premises and all the buildings and erections thereon, (including the very buildings in question,) and had covenanted to repair them, and leave

(*f*) *Farrant v. Thompson*, 5 B. & Ad. 826.

(*g*) *Steward v. Lombe*, 1 Brod. & B. 506.

(*h*) *Naylor v. Collinge*, 1 Taunt. 19.

(*i*) *Marter v. Bradley*, 9 Bing. 24.

and yield them up in repair at the end of the term, he was liable on his covenant for not doing so (*k*).

SECTION IV.

Farm Fixtures.

A tenant of a farm is not entitled to the exemption for his farm fixtures, or those things which he may have fixed to the freehold for agricultural purposes, which a tenant in trade enjoys with respect to things so fixed for the purposes of his trade. And therefore, where the tenant of a farm erected, at his own expense and for the necessary and more convenient occupation of his farm, a beast house, fuel house, cart house, carpenter's shop, pump house, and foldyard wall, which buildings were of brick and mortar, let about a foot and a half into the ground, and tiled; the carpenter's shop was closed in, but the others were open in front, and supported on pillars of brick; previously to the expiration of the lease, the defendant pulled down all these buildings, levelled the foundations, and left the premises in precisely the same state as he found them, and the landlord thereupon brought an action on the case in the nature of waste against him for doing so: the court held that the defendant had no right to take away these erections; no case had as yet gone the length of establishing, that buildings subservient to the purposes of agriculture, as distinguished from those of trade, have been removable, either by the executor of tenant for life, or by the tenant himself who built them. *Ld. Kenyon*, indeed, in delivering his judgment in *Penton v. Robart*, 2 East, 88, extends the indulgence of the law to the erection of greenhouses and hothouses by nurserymen, and, by implication, to buildings by all other tenants of land; but there was certainly no decided case, nor any recognized opinion or practice on either side of Westminster Hall, to warrant such an extension (*l*). But where the tenant of a farm erected a wooden barn, upon a foundation of brick and stone, the foundation being let into the ground, but the barn merely resting upon the foundation, and confined there by its own weight alone:—it was holden that he might remove it, or he might maintain trover against any person converting it, even after the expiration of his term, and after he had quitted possession; for this barn, resting merely on the brickwork, and not fixed to it otherwise than by its own weight, was not a fixture at all (*m*). So, a wooden stable on blocks or

(*k*) *Thresher v. East London Water-works Company*, 2 B. & C. 608.

(*l*) *Elves v. Man*, 3 East, 28.

(*m*) *Wansbrough v. Merton*, 4 Ad. & El. 884.

rollers (*n*), or any wooden building on blocks or pattens (*o*), and not otherwise fixed to the freehold, are not deemed fixtures, and may be removed by the tenant at any time.

Now, however, by stat. 14 & 15 Vict. c. 25, s. 3, if any tenant of a farm or lands shall, after the passing of this Act (*p*), with the consent in writing of the landlord for the time being, at his own cost and expense, erect any farm-building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes, or for the purposes of trade and agriculture, (which shall not have been erected or put up in pursuance of some obligation in that behalf,) then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed :—provided nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid, without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do ; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord ; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same (*q*).

SECTION V.

Right to Fixtures by Representatives.

Heir or executor.] The general rule is, that he who is entitled to the land is entitled to everything fixed to it. Where, therefore, a person dies possessed of a term for years in land, everything fixed to the land, as well as the term itself, go to his executors or administrator. If he die seised of an estate in fee, the general principle is, that the land and everything fixed

(*n*) See *Fitzherbert v. Shaw*, 2 H. Bl. 268, *ante*, p. 855.

(*o*) See *Naylor v. Collinge*, 1 Taunt. 19, *ante*, p. 367.

(*p*) 24 July. 1851.

(*q*) 14 & 15 Vict. c. 25, s. 3.

to it, shall go to the heir. But if a trade be carried on upon the land, then the vats, machinery, &c., erected for the purposes of the trade, will go to the executor, the land itself to the heir. With respect to this, however, a distinction is taken: every instrument, engine, or utensil, fixed to the freehold, as a means for enjoying the benefit of the inheritance, shall go to the heir, and not to the executor; but every such instrument, engine or utensil fixed to the freehold solely for the purposes of a trade which the deceased carried on, goes to the executor, not to the heir. Thus, where the owner of the fee, having salt springs upon his estate, erected salt pans of iron, fixed to the earth by mortar, with furnaces under them, for the purpose of deriving profit from the salt springs, and he also erected houses for the workpeople, and in this manner he realized a profit from his salt springs of about 8*l.* a week; and upon his death, it became a question whether the executor or the heir at law should have the salt pans: the court of King's Bench held that the heir was entitled to them; the deceased had erected them as a means of enjoying his inheritance, and without them the heir could not enjoy it,—the salt springs, and the houses erected by the deceased, would be useless; whereas if they were to go to the executor, he would be at the expense of removing them, and then they would sell merely for old iron (z). But all erections upon land, for the purpose of carrying on a trade, and not for the purpose of thereby enjoying the inheritance, go to the executor, and not to the heir.

Remainderman or executor of tenant for life.] The general rule in this case, as in the case between heir and executor, is, that all things fixed to the freehold, pass with the freehold to the remainderman, upon the death of the tenant for life. But the law is more favourable to the executor in this case than in the other; for not only is the executor, in this case, entitled to all things fixed to the freehold solely for the purposes of trade, but he is also entitled to them in those mixed cases where the tenant for life has erected such fixtures, for the purpose of enjoying the profits of the land by means of carrying on a trade. And therefore where the tenant for life erected an engine, for the purpose of working a colliery upon the land, *Ld. Hardwick, C.*, held that the executor of the tenant for life was entitled to it (a).

In case of execution against the tenant.] If a writ of *fieri facias* is sued out against a tenant, the sheriff may seize,

(z) *Lawton v. Salmon*, 1 H. Bl. 259, n.

(a) *Lawton v. Lawton*, 1 Atk. 13. *Ld. Dudley v. Ld. Ward*,

Amb. 113. See the judgment of *Ld. Ellenborough, C. J.*, in *Elves v. Maw*, 3 East, 50.

remove and sell all fixtures, which the tenant himself might remove during his term. Therefore where a *feri facias* issued against a soap-boiler, it was holden that the sheriff might remove vats which the defendant had fixed to the freehold for the purposes of his trade (b). But the sheriff cannot seize them after the tenancy is at an end, and the landlord has obtained possession (c). So, machinery which had been set up by the landlord, cannot be taken in execution under a writ of *feri facias* against the tenant, although the tenant, without the assent or knowledge of the landlord, had previously severed them (d). So, if they have been mortgaged by the tenant, they cannot be taken in execution for his debt (e).

So, where tenant in fee is in possession, the sheriff, under a *feri facias* against him, may seize, remove, and sell all fixtures which would go to the executor and not to the heir, but not those to which the heir would be entitled. And therefore, where the owner of the fee built a house upon it, and fixed certain fixtures in it, namely, set pots, ovens, and ranges: it was holden that the sheriff could not seize these under a *feri facias* against the owner of the fee, for they were fixtures which would go to the heir, not to the executor (f).

But a landlord cannot distrain fixtures for rent (g); not even those which the tenant would be entitled to remove (h).

In the case of the bankruptcy of the tenant.] If the tenant become bankrupt, his assignees will be entitled to all those fixtures which the bankrupt might by law remove during his tenancy. And therefore if a tenant be entitled to trade fixtures (i), his assignees may remove and sell them (k). But fixtures are not goods and chattels within that section of the Bankrupt Act (l), which vests in the assignees all goods and chattels in the bankrupt's possession, order or disposition, at the time he becomes bankrupt (m). And therefore fixtures in his possession, which belong to his landlord, and which he could not legally remove, do not pass to his assignees (n).

Where the owner of the fee becomes bankrupt, the assignees are of course entitled to all fixtures to which the bankrupt is entitled, for they are entitled to the land itself.

(b) *Poole's case*, 1 Salk. 308.

(c) *Minshall v. Lloyd*, 2 Mees. & W. 450.

(d) *Farrant v. Thompson*, 5 B. & A. 826.

(e) *Steward v. Lombe*, 1 Brod. & B. 503.

(f) *Winn v. Ingilby et al.*, 5 B. & A. 625.

(g) *Danby v. Harris*, 1 Q. B. 893; 10 Law J. 294, qb.

(h) *Id.*, and see *ante*, p. 122.

(i) See *ante*, p. 356.

(k) *Trappes v. Harter*, 2 Cr. & M. 153.

(l) 12 & 13 Viet. c. 106, s. 125.

(m) *Ex p. Wilson*, 4 Deac. & Ch. 143. *Ex p. Spicer*, 3 Mont. & Ayr. 213. *Ex p. Lloyd*, 1 Id. 494. *Ex p. Belcher*, 2 Id. 160. *Ex p. Smart*, 2 Id. c0. *Boydell v. M'Michael*, 1 Cr. M. & R. 177.

(n) *Horn v. Baker*, 9 East, 215. *Coombs v. Beaumont*, 5 B. & Ad. 72.

SECTION VI.

Actions for or in relation to Fixtures.

By landlord.] If the lessee remove fixtures belonging to the landlord, the latter may recover damages against him in an action on the case in the nature of waste (*o*). Or he may maintain trover against the tenant or any other person, who after severance of the fixtures converts them to his own use. And therefore, where a mill and machinery were let to a tenant, and he, without the permission of his landlord, severed the machinery from the mill, and it was afterwards seized by the sheriff under a writ of *fieri facias* against the tenant, and sold: it was holden that the landlord might maintain trover for the value of the machinery seized and sold, against the person who purchased it of the sheriff; the machinery had been parcel of the inheritance, and the instant it was severed it became the property of the reversioner; and as the sheriff had therefore wrongfully taken the property of the reversioner under a *fi. fa.* against the tenant, he could acquire no title by his wrongful act, and could convey none to the purchaser (*p*).

By tenant.] Where the tenant is wrongfully dispossessed of fixtures belonging to him, if they be still fixed to the freehold, he cannot maintain trover for them, for until severance they are not goods and chattels (*q*); the proper form of action is trespass. And therefore, where a fiat in bankruptcy was sued out against the tenant, under which the term in certain premises which he had occupied, together with the fixtures, were sold by his assignees in one lot to the same person, and the fixtures were not severed: the court held that he could not maintain trover against the assignees for the fixtures; they were still parcel of the freehold, and could not be the subject of an action of trover (*r*). But if they be severed (*s*), or if they be things which are not really fixed to the freehold (*t*), trover will lie for them; and if by mistake they be named "fixtures" in the declaration, this will not be material after verdict (*u*). And on the other hand, in trespass for taking, severing and removing fixtures, as a distress for rent, where the declaration named them "goods, chattels and effects," it was holden to be sufficient after verdict (*v*).

(*o*) See *ante*, p. 349.

(*p*) *Farrant v. Thompson*, 5 B. & A. 826.

(*q*) *Mackintosh v. Trotter et al.*, 3 Mees. & W. 184. *Ruffey v. Henderson*, 21 Law J. 49, qb.

(*r*) *Mackintosh v. Trotter*, *supra*.

(*s*) *Dalton v. Whitem et al.*,

12 Law J., 55, qb.; and see *Farrant v. Thompson*, *supra*.

(*t*) *Davis et al. v. Jones et al.*, 2 B. & A. 165.

(*u*) *Sheen et al. v. Rickie et al.*, 5 Mees. & W. 175.

(*v*) *Pitt v. Shew et al.*, 4 B. & A. 206.

By assignee, mortgagee, &c.] The assignee of the reversion may maintain the same form of action, and in the same cases, as the lessor; and the assignee of the term, the same as the lessee. And where a tenant mortgaged his term, but was allowed to remain in possession, and upon his becoming bankrupt his assignees severed and sold the fixtures which were upon the demised premises, some of them landlord's fixtures and some tenant's fixtures, and damaged the premises in removing them: it was holden that the bankrupt, as mortgagor in possession, was tenant to the mortgagee, so as to make the mortgagee a reversioner, and therefore that the latter might maintain an action against the assignees of the bankrupt for the injury done to his reversion by severing the fixtures: there was also a count in trover for the fixtures, and it was objected that the bankrupt was under covenant to his landlord to yield up at the end of the term all "fixtures and things" to the messuage belonging or to belong, and all the fixtures therefore being the landlord's, trover would not lie for them, either by the bankrupt or his mortgagee; but the court held that the tenant or his assignee of the term had a right to bring trover for the fixtures during the term, whatever might be the rights of the landlord when the term should be at an end (*w*). But where the lessee of a house, containing fixtures, mortgaged his term without mention of the fixtures, and afterwards assigned the premises and all his estate and effects to trustees for the benefit of his creditors, and the trustees being in treaty for the sale of the fixtures, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused on demand to deliver up the fixtures: the trustees having brought trover for the fixtures, the court held that it would not lie; for the defendant being in possession of the realty to which they were fixed, his refusal to sever and give them up could not be deemed a conversion (*x*).

By vendor against vendee.] Where fixtures are sold and possession given to the vendee, an action of *indebitatus assumpsit*, or debt on simple contract, will lie for the price (*y*). But if they be still fixed to the freehold, they should not be described as "goods" sold and delivered, for they are not so, and the plaintiff cannot recover under such account (*z*); they should be described as fixtures, or by such appropriate name as is applicable to them. And on the other hand, if they be severed from the freehold, they should not be described as fixtures;

(*w*) *Hitchman v. Walton*, 4 Mees. & W. 409.

(*x*) *Longstaffe et al. v. Meagoe*, 2 Ad. & El. 167.

(*y*) See *Salmon v. Watson*, 4 Moore, 73.

(*z*) *Lee v. Risdon*, 7 Taunt. 188.

Clarke et al. v. Bulmer et al., 11 Mees. & W. 243. *Nutt v. Butler*, 5 Esp. 176.

although this would be holden sufficient after verdict. But where by an agreement between A. and B., B. was to accept of the assignment of the lease of a farm from A., and was to take the fixtures and crops at a valuation; and B. was let into possession of the fixtures, and the crops were valued to him, but the lease was not assigned: it was holden that under these circumstances, *indebitatus assumpsit* would not lie for the price of the fixtures and crops, but the plaintiff ought to have declared specially upon the agreement (a). Where a freehold mansion-house was sold by public auction, without any stipulation on the part of the vendor that the fixtures were to be taken and paid for separately, and the vendee, who had paid the purchase-money, entered into possession under the conveyance: it was holden that the fixtures in the house passed to the vendee under the conveyance, and that the vendor could not maintain any action in respect of them (b).

Where A. occupied a house as tenant to B., in which there were certain fixtures which A. had purchased on entering the house, and which he had a right to remove during his tenancy; and a few days before the tenancy expired, A., at B.'s request, agreed not to remove the fixtures, B. agreeing to take them at a valuation to be made by two brokers; thereupon A., at the expiration of the term, delivered up possession of the premises, with the fixtures, to B., and the valuation by the brokers was made on the day following; in an action of *indebitatus assumpsit* as for the price and value of fixtures bargained and sold, and sold and delivered, the court held that the plaintiff was entitled to recover; it was not a sale of an interest in land within the fourth section of the statute of frauds, so as to render a memorandum in writing, signed by the parties, necessary (c).

(a) *Neale v. Viney*, 1 Camp. 471.

(c) *Hallen v. Runder*, 1 Cr. M. &

(b) *Colegrave v. Dios Santos*, 2 B. & C. 76; and see *Wiltshire v. Cottrell*, 22 Law J. 177, qb. R. 266.

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THE END.





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